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Abstract

Gen. No. 10253 Agenda No. 5

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

MAY TERM, A. D. 1948

WILLIAM C. HANNA,  
Plaintiff-Appellee  
  
v.  
  
FLORENCE YEOMAN, et al.  
Defendant-Appellant

336 I.A. 43

APPEAL FROM THE  
CIRCUIT COURT OF  
LAKE COUNTY

Dove, J.

Plaintiff, William C. Hanna, a general contractor, brought this suit in the Circuit Court of Lake County to foreclose a mechanic's lien against the defendant, Florence Yeoman. The notice of lien was filed on February 20, 1941 and the complaint to foreclose same was filed January 9, 1943. The complaint was based upon an oral contract entered into by the parties on March 20, 1940 by the provisions of which the plaintiff was to furnish necessary labor and materials required to remodel the building owned by the defendant into four apartments, for which plaintiff was to receive the cost of the necessary material and labor plus ten per cent.

No point is made as to the pleadings so they need not be considered. After the issues had been made up the cause was referred to a special Master who took the evidence



1940

1940

1940

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM A. D. 1940

88-1-38

WILLIAM A. D. 1940  
JULY 1940  
LAW OFFICE

WILLIAM A. D. 1940  
JULY 1940  
LAW OFFICE

1940

WILLIAM A. D. 1940, a general contractor,  
brings this case in the Circuit Court of Cook County to  
enforce a contract's lien against the defendant, William  
A. D. 1940. The action of lien was filed on January 20, 1940.  
and the complaint to enforce same was filed January 2, 1940.  
The complaint was based upon an oral contract entered into by  
the parties on March 22, 1940 by the provisions of which the  
defendant was to furnish necessary labor and materials for  
the erection of a building owned by the defendant, William  
A. D. 1940. The complaint was to enforce the cost  
of the materials, for which defendant was to provide the cost  
of the necessary material and labor plus ten per cent.  
No point is made as to the standing so that need  
not be considered. After the answer had been made on the  
case was referred to a special master who took the evidence



and found that the plaintiff was entitled to a mechanic's lien in the amount of \$983.30 with interest from February 1, 1941. Objections and exceptions to this report were overruled, the report was approved by the chancellor and a decree rendered awarding the plaintiff a mechanic's lien for the amount found due him by the special Master and directing the foreclosure thereof. To reverse this decree defendant appeals.

It appears from the evidence that on January 2, 1941 the plaintiff sent to the defendant a statement for labor performed and materials furnished from March 26, 1940 to July 24, 1940 in the amount of \$5166.20. Thereafter and on February 15, 1941 plaintiff sent another statement to defendant as follows:

Jan. 2, 1941	Bill rendered.....	\$5166.20
Aug. 31, 1940	Plumbing bill on closet, Apt. 2.....	2.20
Sept. 14, 1940	Plumbing labor on lavatory, rear Apt.....	2.20
Dec. 16, 1940	Labor on heating boiler....	2.75
Jan. 10, 1941	3 Storm Sash.....	9.92
		<hr/>
		\$5183.27
	Credit by payments.....	4200.00
	Balance due.....	<hr/>
		\$ 983.27

Defendant contends that the plaintiff has failed to establish by the evidence that the notice of mechanic's lien was filed within four months from the completion of the work under the contract and has likewise failed to prove that this suit was commenced within two years after the completion of the work and in this connection argue that the statement rendered by plaintiff to the defendant on January 2, 1941 was a final statement as the job had then been completed more than 4 months and that the statement rendered on February 15, 1941 was for repairs and storm sash not included in the original



and found that the evidence was sufficient to establish the guilt of the defendant.

[illegible]



contract. Counsel insists that this must necessarily be true because the prior statement of January 2, 1941 contained an item of \$1449.80 for plumbing paid to J. W. Peterson on June 10, 1940 and that the three plumbing and heating charges aggregating \$7.15 had been incurred prior to the time the statement of January 2, 1941 had been sent by the plaintiff to the defendant.

It was the contention of the plaintiff before the Master and the Chancellor that the statement rendered by him on January 2, 1941 was for labor performed and materials furnished during the year 1940, for which the plaintiff had received bills up to the date of the statement; that the job was not completed until January 10, 1941 when the three storm sash were delivered to the premises and accepted by the defendant, and that the statement of February 15, 1941 was the final statement for the complete contract.

The Master and Chancellor both found that the defendant was the owner of the premises in question and on March 24, 1940 entered into an oral contract with the plaintiff by the provisions of which plaintiff was to furnish all building materials, labor and service needed to be used in and about the remodeling of said building for which defendant agreed to pay the plaintiff for said materials, labor and services at the reasonable, usual and customary price thereof and in addition thereto the contractor's usual profit of ten per cent on the total amount of materials, labor and services so furnished and <sup>on</sup> any extra material that might be needed from time to time in such remodeling; that the plaintiff did, in compliance with the terms of said contract, proceed with the remodeling, construction and alteration of the building







on said premises and did furnish all necessary materials, labor and services for that purpose and did in all respects comply with the terms of said contract and that the furnishing of said materials, labor and services was completed on the 10th day of January 1941 and on that day performance of said contract was concluded.

The defendant testified that the apartments were completed and ready for occupancy on June 1, 1940, that the plumbing work was completed at that time and that neither the plaintiff or Mr. Peterson, the plumber, did any work to complete the plumbing after June 1, 1940. Her conclusion that the apartments were completed on June 1, 1940 and that no further work was done after that date is at variance with the testimony of the plaintiff and Mr. Peterson and there is no denial that at the request of the defendant early in December, the defendant ordered the three storm sash, had them delivered to the apartment and they were received by the defendant on January 10, 1941. We have read the evidence as found in the original and in the additional abstract. There is some conflict in the testimony. The Master, however, saw the witnesses and heard them testify. His findings were approved by the Chancellor. In *Schnoor v. Terlep*, 399 Ill. 101 the Supreme Court said: <sup>(p. 112)</sup> "Upon principles so well established as to require no citation of authorities, we must once again observe that where a cause is heard before a Master, the findings of the Master, although not to be accorded the weight of a jury verdict, are advisory and thus entitled to much consideration. The Master



On this occasion the following was said: "The Government has been very kind to me, and I am very grateful to them. I am sure that the Government will continue to be very kind to me, and I am sure that the Government will continue to be very kind to me."



who saw and heard the witnesses testify had the best opportunity to judge their credibility. While it is true that in a chancery case the facts are found by the chancellor and the Master's report is only prima facie correct, where the master's conclusions have been approved by the chancellor, we are not justified in disturbing those findings when they are not manifestly against the weight of the evidence." Here the findings are sustained by the evidence.

The decree of the Circuit Court of Lake County must be affirmed.

Decree affirmed.



the fact that the defendant's conduct was not  
intentional or negligent. It is also true  
that in a number of cases the facts are found to be  
such that the defendant's conduct is not negligent.  
In such cases the defendant's conduct is not negligent.  
It is also true that in a number of cases the facts  
are found to be such that the defendant's conduct is  
not negligent. Here the findings are sustained by the  
evidence.

Very respectfully,  
[Signature]



44279

NATIONAL INDUSTRIES, INC.,  
(formerly The National Mineral  
Company,) an Illinois corporation,

Appellee,

v.

ABRAHAM BLOCK, doing business as  
WESTERN HAIR GOODS, INC., and  
WESTERN HAIR GOODS COMPANY and  
WESTERN HAIR GOODS, INC.,

Defendants,

On Appeal of WESTERN HAIR GOODS, INC.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

336 I.A. 148

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a contract action to recover the price of goods sold and delivered to defendants "or to either of them" at the request of defendants or "either of them". The trial court without a jury found the individual defendant, doing business as the Company or as the Corporation, not guilty. It found the corporate defendant guilty and entered judgment for \$1,564.35. The corporate defendant has appealed. Plaintiff has cross appealed.

Plaintiff manufactures and sells beauty parlor supplies, including the "Helene Curtis line". The Western Hair Goods Company was organized in Missouri in 1928 and its charter was forfeited in 1931. Block's wife was an employee of that company. Defendant, Western Hair Goods, Inc. was organized in Illinois in 1931. It had a branch licensed to do business in Missouri until 1936. In 1945 defendant Block became president, his brother-in-law vice president and his wife secretary-treasurer of the Illinois corporation. In 1936 the Western Hair and Beauty Supply Co. was incorporated in Missouri with Block, his brother-in-law and his wife the officers.







Early in 1940 plaintiff commenced to do business with the Western Hair Goods Company of St. Louis, Mo. There was then no Missouri corporation of that name. Correspondence from St. Louis with reference to the business was written on stationery carrying the name Western Hair Goods Company. The account was carried on plaintiff's books in the name of Western Hair Goods Company. Checks in payment were received from St. Louis and bore the name Western Hair Goods Company. There was no Missouri corporation named Western Hair Goods, Inc. at the time. The defendant corporation was not then authorized to do business in Missouri. This situation prevailed during the period, covered by the account sued upon, from September 1945 to March 1946. It is conceded that all of the merchandise, basis of the account, was shipped to St. Louis.

The defendant contends that no proof was made of the delivery of the merchandise to the corporate defendant against whom judgment was entered. There can be no controversy about this. It is clear from the evidence, however, that the merchandise was delivered to the Western Hair Goods Company, 513 Olive Street in St. Louis, Mo. This is the address given on the stationery for the Western Hair Goods Company.

The individual defendant in his Defence denied purchase or delivery of the merchandise. The trial court found against plaintiff on the issues as to the individual defendant doing business as Western Hair Goods Company. It found against the corporate defendant on the ground that plaintiff had been induced to believe it was doing business with that corporation through the conduct of the corporation holding itself out in St. Louis as the purchaser.







The principal issue at the trial was the determination of the party with whom plaintiff had contracted. Plaintiff's evidence tended to prove that the Western Hair Goods Company was merely a business name for Block. The testimony for Block was that he advised plaintiff in the beginning and that it knew later through its own inquiry, that the Western Hair Goods Company was the business name for the Western Hair and Beauty Supply Co., a Missouri corporation. It was Block's theory at the trial that plaintiff knew it was dealing with the Missouri corporation and that it should have sued the Western Hair and Beauty Supply Co. in Missouri. Plaintiff's theory was, necessarily, vague at the trial. It had shipped the goods to Western Hair Goods Company in St. Louis. It had not been paid. It was faced at the trial with Block doing business as the unincorporated company, the Illinois corporation unauthorized to do business in Missouri and the Missouri corporation, of which plaintiff, according to it, did not know during the course of the business.

At the outset we agree with defendant that the question of interest on the account is not before us. No claim for interest was made until after defendant had filed its notice of appeal in the trial court.

Plaintiff, to prove the identity of the contracting persons, relied upon testimony of conversations between its officers and Block and on the correspondence, checks, etc. bearing the names Western Hair Goods Company and Western Hair Goods, Inc. Defendant relied upon Block's version of the conversations and upon a Dun and Bradstreet Report furnished to plaintiff at its request in 1943. This report







was on the Western Hair and Beauty Supply Co. It disclosed the names of officers, the affiliation of the company with the Illinois corporation and the address, 513 Olive Street, St. Louis, Mo. This report, according to plaintiff was not procured to determine the identity of the St. Louis purchaser, but to fulfill a routine requirement of Walter E. Heller Co. with which it discounted its receivables. Testimony for plaintiff was that the report had not been brought to the attention of officers so as to give them notice, but merely placed in its file of the Western Hair Goods Company for convenience of the Heller Co. auditor.

We cannot decide as a matter of law, on this record, that the financial report put plaintiff on its notice that it was actually dealing with the Missouri corporation. Neither do we feel justified in accepting Block's version of what transpired when the account was set up originally. We believe, however, that the trial court should have found from the testimony that plaintiff was led by Block to believe that it was doing business with him individually. Plaintiff's comptroller in describing the original contract repeatedly referred to selling Block, shipping goods to Block in St. Louis, and Block's good credit, etc. He testified that Block gave the business name, Western Hair Goods Company. This testimony was refuted by Block who says he told the comptroller that the Missouri corporation operated under the business name of Western Hair Goods Company. He further testified that the checks sent to plaintiff from Missouri were drawn on the account of the Missouri corporation, although the checks bore the name, Western Hair Goods Company. During the course of his testimony as an adverse witness Block said, "I







was discontinued as distributor by the Company." "When I say I, I mean Western Hair Goods Company in St. Louis." It is our opinion, and we therefore find, that plaintiff dealt with Block, doing business as Western Hair Goods Company. We think judgment was erroneously entered against the corporate defendant. The evidence does not support the finding that it held itself out as the purchaser. Judgment should have been entered in favor of plaintiff and against Block, doing business as Western Hair Goods Company. This conclusion obviates the necessity of considering points raised by defendant relating to variance. We see no merit to the contention that the court erroneously admitted documentary exhibits offered by plaintiff. The exhibits were identified but not received during the taking of evidence, but defendant's counsel suggested they be filed in court after the case was closed.

For the reasons given the judgment against the Western Hair Goods, Inc., an Illinois corporation, is reversed. It is our view that upon the record judgment should be and it hereby is entered in favor of plaintiff and against the individual defendant. (Ebbert v. Metropolitan Life Ins. Co. 369 Ill. 306.)

JUDGMENT REVERSED AND JUDGMENT HERE  
IN FAVOR OF PLAINTIFF AND AGAINST  
THE INDIVIDUAL DEFENDANT.

BURKE, P.J. AND LEWE, J. CONCUR.







44477

WILLIAM C. IRWIN and ANNE I.  
IRWIN,

Appellees,

v. .

JACOB A. KREUTZER and 1800 North  
FRANCISCO CORP., a corporation,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

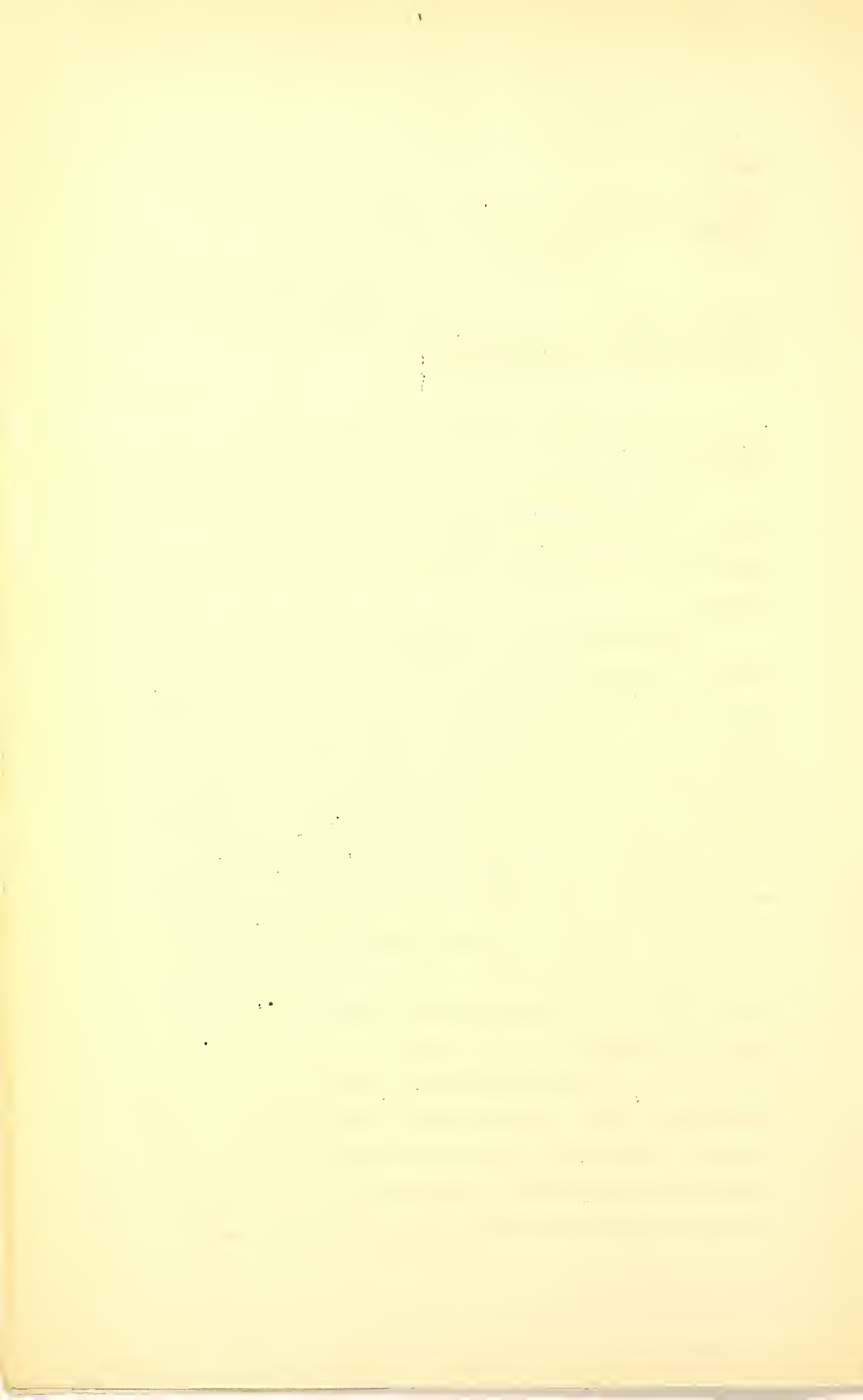
336 I.A. 149

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF  
THE COURT.

From a judgment in a forcible entry and detainer  
action in the Municipal Court of Chicago in favor of  
plaintiffs, entered upon a verdict of the jury, defendants  
appeal.

Plaintiffs leased the premises in question to  
defendant Kreutzer for one year, ending December 9, 1947,  
at a rental of \$500 per month. The lease had the following  
provision: "In consideration of this demise Lessors do  
hereby give and grant to Lessee an option to purchase the  
said real estate at the price of \$37,000.00. Said option  
may be exercised by the Lessee on May 10th, A. D. 1947,  
or at any time within thirty days thereafter by serving  
a notice upon either of Lessors specifying his election  
so to do." On May 1, 1947, Kreutzer assigned the lease  
and the option to defendant 1800 N. Francisco Corp., the  
assignee assuming all of the obligations under the lease.  
A notice of assignment and copy was served upon plaintiffs,  
dated May 2, 1947, accompanied by a check of \$500 for the  
May rent, which was accepted by plaintiffs. On June 1,  
1947, defendant corporation served notice on plaintiffs  
that they elected to exercise the option to purchase the







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real estate at the price specified in the lease. On June 12, 1947, defendant corporation delivered to plaintiffs two checks - one for \$166.67, reciting that it was to cover the balance of the period occupied by the corporation as a tenant, and a \$500 check as a credit upon the purchase price. Both checks were retained by plaintiffs. ✓

It appears that on June 24, 1947, plaintiffs delivered to defendant's attorneys a survey of the premises and a guarantee policy together with an opinion of title brought down to date. July 16, 1947, plaintiffs' attorneys wrote to the attorneys for the defendant corporation, enclosing the letter of opinion and suggesting closing the transaction Friday or Saturday of the following week. There were further communications between the parties concerning definite arrangements for closing the deal; that a registered letter dated October 14, 1947, was served upon the defendant corporation by the plaintiffs, stating that plaintiffs were willing to perform the agreement to convey the property at the price fixed, provided the purchase price was paid at the offices of the attorneys for plaintiffs on or before November 15, 1947, and that in the event defendant did not deliver the purchase price on or before said date, it would have no further rights under the option granted by the lease in question.

November 7, 1947, defendant corporation by letter notified the attorneys of the receipt of the letter of October 14, and that the corporation would on or before November 15, 1947, at the place specified, pay the price demanded in the letter. November 14, a further notice was served upon the attorneys for plaintiffs that in compliance with their letter of October 14, representatives of the corporation would appear at the place directed in said letter, on November 15, before 12 o'clock noon, and tender







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the purchase price as specified.

Defendants, upon the trial, offered to prove that the full amount of the purchase price was tendered at the offices of the attorneys for plaintiff, being the place designated, on November 15, 1947. The court excluded this evidence and offer of proof and directed a verdict for plaintiffs. ✓

The facts presented are not unlike those in Stanwood v. Kuhn, 132 Ill. App. 466, where the judgment was reversed because the court excluded such evidence.

If defendant, after its notice of exercise of the option to purchase and the tender of the purchase price, was holding under a claim as vendee, and not as a tenant, the plaintiffs would not be entitled to maintain forcible entry and detainer for failure to pay the stipulated rent in the lease. As was said in Stanwood v. Kuhn:

"Where a lease gives to the lessee an option to purchase, and the lessee exercises his option, he is no longer a tenant, but is a vendee."

Defendant was entitled to make proof of the exercise of his option to purchase, and that he made the tender in good faith, and to have the jury pass upon the facts, if there be any dispute.

Most of the contentions raised by plaintiffs might well be addressed to a court in an action for specific performance, but in the instant action the sole question was whether the defendant was holding possession without right. Dillow v. Hileman, 300 Ill. App. 509.

For the reasons stated the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Tuohy and Niemeyer, JJ., concur.







44494

CHESTERFIELD WOODS,

Appellee,

v.

LUCILLE BUTLER,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

336 I.A. 130

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF  
THE COURT.

This appeal is from an order of the Municipal Court of Chicago, denying defendant's motion to vacate a judgment in a forcible detainer action. The action was filed September 18, 1947. The judgment order of October 2, 1947, recites that the parties agreed in open court to a finding in favor of plaintiff, and that plaintiff have judgment for possession. By the same order the writ of restitution was stayed to January 2, 1948, with a provision in the judgment order that plaintiff could accept rent for use and occupancy for the period during which the writ of restitution was stayed, without prejudice.

On March 4, 1948, defendant filed a sworn petition to vacate the judgment entered October 2, 1947, in substance alleging that she was not present when the case was called for trial, having been advised by the attorney who represented plaintiff that it would be unnecessary for her to be present in court, and that she would obtain all time necessary for her to find another apartment in which to move; that in the event she had not sufficient time, he would see that additional time, from time to time, would be given her to find another apartment; that, relying upon the promises made to her by the attorney for plaintiff, petitioner did not retain counsel, nor did she appear at the hearing,







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but was advised by the attorney for plaintiff that she was to remain in the apartment until January 2, 1948; that on November 3, 1947, plaintiff agreed with her that it would be unnecessary for her to vacate said premises, as he was only desirous of obtaining rent, and that if petitioner would pay the rent promptly on the date it was due, plaintiff would not enforce the judgment for possession, and petitioner would not have to vacate; that, relying upon the promises made, petitioner paid plaintiff \$45, the stipulated rent from November 1 to November 30, 1947, which is evidenced by a receipt from plaintiff, a copy being attached to the petition; that again on December 2, 1947, petitioner paid the same stipulated rent, which was accepted by plaintiff as rent and was again evidenced by a receipt, copy of which is attached to the petition; that again on January 2, 1948, the last day of the stay order, petitioner paid to plaintiff, and plaintiff accepted, \$45 for rent from January 1, 1948, to February 1, 1948, and that said payment was evidenced by a receipt, copy of which was attached to the petition; that because of said matters alleged, the relationship of landlord and tenant was revived and restored to petitioner; and that plaintiff ~~should~~ not be permitted to enforce the judgment order of October 2, 1947.

The only question involved, as we view this record, is whether the facts set up in the petition, and not denied, were sufficient to require the court to vacate the judgment and quash the writ of restitution. The ~~provision~~ in the order that plaintiff could accept rent for use and occupancy, without prejudice, was limited to the



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period during which the writ of restitution was stayed, and could not go beyond it. When on January 2, 1948, plaintiff accepted the stipulated rent, it created a new tenancy following the entry of the judgment, which terminated the old tenancy. Jordan v. Mehl, 324 Ill. App. 305, 311; Woodbury v. Ryel, 128 Ill. App. 459, 461. The petition sufficiently tendered an issue of fact and, if controverted, a hearing should be had.

The judgment of the Municipal Court is therefore reversed and the cause remanded with directions to grant a hearing upon said petition.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Tuohy and Niemeyer, JJ., concur.







44512

FRED C. KRAMER COMPANY, INC.,  
Appellant,

v.

HEBARD STORAGE WAREHOUSES,  
INCORPORATED and F. H. HEBARD  
COMPANY,  
Appellees.

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) APPEAL FROM  
) SUPERIOR COURT,  
) COOK COUNTY.  
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3361.A. 150<sup>2</sup>

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is by plaintiff from an order of the Superior Court of Cook County striking the amended complaint, consisting of 3 counts, and dismissing the suit. Plaintiff elected to stand by its pleading.

The first count sought to recover duplicate payments made in error; the second for breach of contract; and the third count for money paid under duress, notwithstanding the breach of contract by defendants.

It is alleged in the first count that plaintiff had a prime contract with the U. S. Navy for refrigeration tool kits to be packed for export shipment; that defendant offered to do the packing according to Navy specifications at \$8.00 per kit; that plaintiff placed orders with defendants for the packing of 1890 kits; that defendant F. H. Hebard Company is a wholly owned subsidiary of Hebard Storage Warehouses; that plaintiff paid the invoices rendered by both defendants for the packing of 182 kits; that after such payment, defendant F. H. Hebard Company rendered corrected invoices for the packing of the same kits at the rate of \$10.50 each; that by mistake, plaintiff paid the latter invoices, which were duplicate payments, and that defendants have refused to refund







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to plaintiff \$1456 due plaintiff.

Count 2 charged that on September 7, 1945, defendant Hebard Storage Warehouses notified plaintiff that it refused to further perform unless plaintiff was willing to pay \$10.50 per kit thereafter, as well as a like amount for those kits which had been packed; that plaintiff was unable to obtain such packing from any person or persons, other than defendants, at a lower price than that demanded by defendants; that it made payments on September 2, September 8, September 14, and October 3, 1945, at the rate of \$10.50 per kit; that in addition defendants demanded an extra payment of \$600 to cover additional costs in connection with the packing of the first 322 kits; that plaintiff was obliged to pay the same on September 18, 1945; and that the total sought to be recovered under said count was \$2,605.00.

Count 3 alleged that the United States Navy served notice of termination of plaintiff's prime contracts on August 19, 1945, to the extent of 350 kits; September 5, 1945, 138 kits, and September 28, 1945, 276 kits; that plaintiff, under the termination regulations of the United States Navy, requested defendants to submit, upon forms furnished by the Navy, sub-contractor's settlement claims due to the notice of termination, but that defendants refused to furnish such statements upon the forms furnished by the Navy unless plaintiff would pay defendants \$9,966.48, in accordance with a statement or invoice furnished by defendants to plaintiff, dated January 19, 1946; that negotiations were had between plaintiff and defendants resulting in a revised invoice amounting to \$7,826.16, after credit allowed to plaintiff in the sum of \$596.69 for duplicate payments theretofore made on kits







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delivered; that plaintiff in February, 1947, was compelled to pay the amount to obtain defendants' statement of settlement on the forms so required; that said charges were excessive and unreasonable; that it was obliged to pay said amount in order to obtain a return of the property belonging to plaintiff in the possession of defendants; that plaintiff was able to collect only \$4,268.95 on account of the claim for termination of contract; and that the difference between the amount received from the United States Navy and that paid to defendants was \$3,558.00, the amount sought to be recovered under said count.

Admitting, as the motion to strike does, that plaintiff made duplicate payments by error, as alleged in count 1, it is clear from the averments of count 3, that plaintiff was given credit for such duplicate payments in the final statement rendered by defendants to plaintiff. The true basis of the claims made under all three counts is the alleged breach by defendants of the contract for packing, the breach resting in the refusal to perform under the contract at \$8.00 per kit, and instead demanding \$10.50 per kit, and the alleged excessive charges in addition thereto, included in the final statement of account referred to; and that the payment was made because of so called duress of property or business compulsion. Ill. Merchants Trust Co. v. Harvey, 335 Ill. 284; Kirkeby v. Avenue Hotel Corp., 330 Ill. App. 246.

It was argued, here, to support this pleading, that the prime contract of plaintiff was a war contract, and since







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it was alleged that it could not obtain the packing from any other person, firm or corporation at a lower price, plaintiff was, during the war emergency, in order to prevent default of its own contract with the Government, compelled to make the payments referred to. We take judicial notice that war hostilities had ceased before these payments were made, and when the final statement of account was rendered by defendants to plaintiff, which plaintiff paid.

The additional alleged duress in connection with the payment of the final statement, set up in count 3, was the refusal of defendants to turn over what property they had for packing, belonging to plaintiff, until the final statement of account was paid. As to the claim of duress, we regard plaintiff's position untenable. There is no reason alleged in the pleading, which would excuse plaintiff from pursuing its legal remedy of replevin. In the action of replevin, if it was found that defendants had a lien upon plaintiff's property, arising out of its claim for labor performed, the court in the replevin action could ascertain the correct amount due, if any, and make the judgment for plaintiff conditional upon the payment of said amount. This is expressly authorized by section 22, chapter 119, Ill. Rev. Stat. 1947, the pertinent provisions of which are:

" \* \* \* if the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property in case such property has been delivered to the plaintiff."







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There are no facts alleged in either count 2 or 3, which would show that there was any legal obligation remaining on the part of plaintiff to furnish these kits to the United States Navy, after the dates of termination of the prime contracts. What was said in Ill. Merchants Trust Co. v. Harvey, and Kirkeby v. Avenue Hotel Corp., on the subject of duress or business compulsion, is equally applicable to the instant case. It was said in Ill.

Merchants Trust Co. v. Harvey:

"If he may avoid the payment of such demand by resorting to a remedy in equity but does not avail himself of such remedy the payment is not compulsory even though pressure for payment is re-enforced by a threat to commit injury. \* \* \* We are of the opinion that the forfeiture threatened against defendants in error was cognizable in equity, and that, the demand being invalid and the result of a forfeiture being of serious consequence to defendants in error, equity would have relieved against the same. Defendants in error had sixty days in which to apply for such relief. There was adequate time to secure the aid of equity and that court was open to them. It follows that the payment by them was voluntary and not made under compulsion or duress."

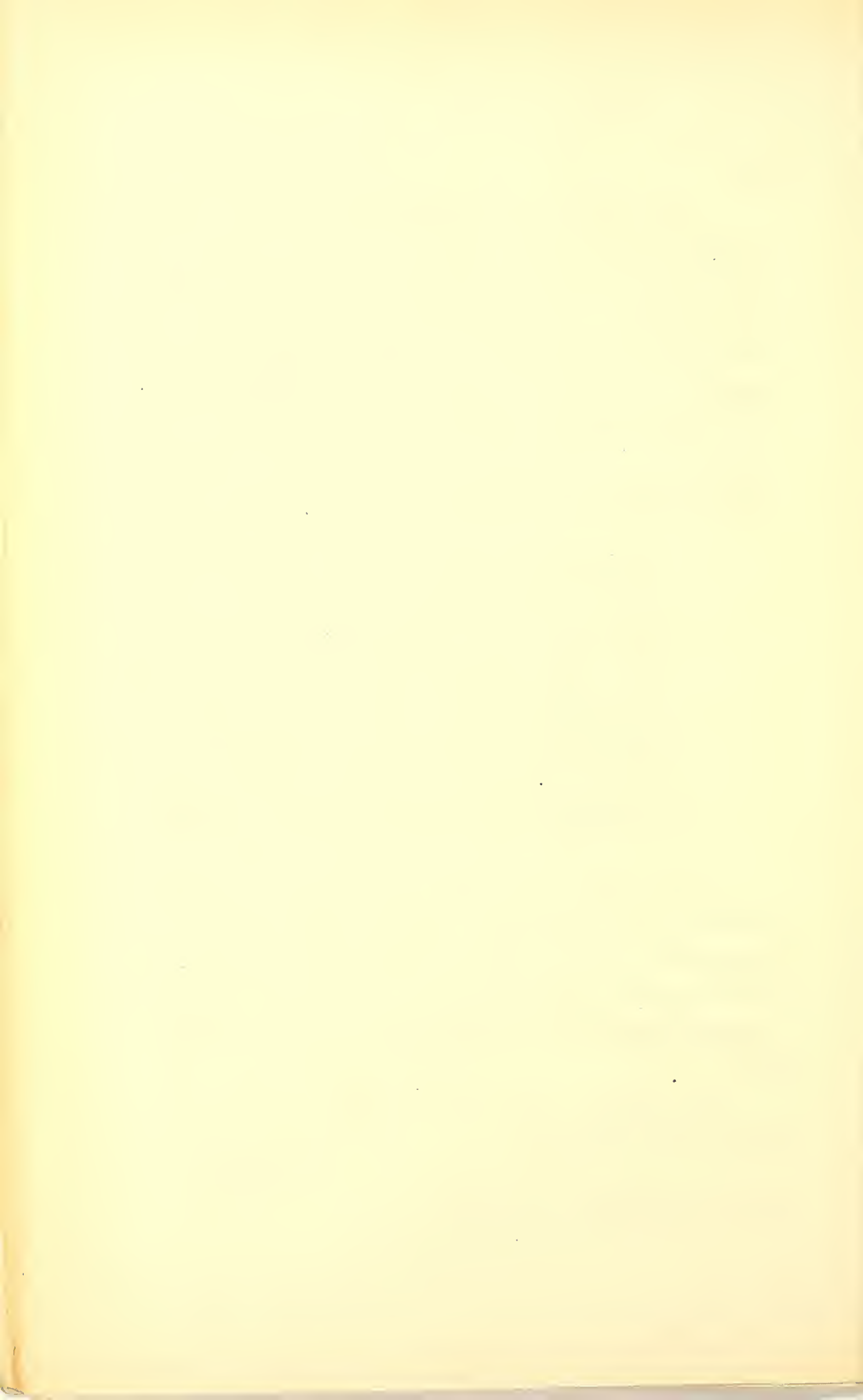
The payment of the final invoice rendered, with no such legal duress or business compulsion present, was a ratification of all that preceded the payment to plaintiff, plaintiff having full knowledge of all the facts. Kirkeby v. Avenue Hotel Corp., and Prontzinski v. Baker, 364 Ill. 451.

The judgment of the Superior Court is correct and accordingly is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.







44490

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

DEWEY BULLOCK, Contemnor,  
Plaintiff in Error.

ERROR TO CRIMINAL COURT  
COOK COUNTY

336 I.A. 151

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order in a contempt proceeding committing him to the county jail for 30 days for the giving of false testimony in a trial in the Criminal court of Cook county on an indictment for embezzlement.

The order finding defendant guilty of contempt and sentencing him was originally entered March 23, 1948. A motion to vacate the order was made immediately and continued from time to time until April 30, 1948, when the prior order was vacated and a new order was entered. This order recites the appearance of the defendant as a witness in the trial pending before the court on an indictment for embezzlement, and sets out verbatim certain testimony of defendant wherein he testified that he had several safety deposit boxes but that he didn't "take this \$400 and put it in your (my) safety deposit box," and that he thereafter admitted that his testimony as to having the safety deposit boxes was false. The court finds that the defendant showed an utter disregard for the sanctity of the oath administered to him; consumed the time of the court in falsely answering the questions propounded to him concerning the safety deposit boxes; and that "the con-







2.

temnor's attitude and misrepresentation tended to lessen the dignity of the court." There is no finding that the false testimony of defendant was material to any issue then before the court, and there is nothing in the record before us suggesting its materiality. The false statements of the witness, therefore, did not constitute perjury.

People v. Glenn, 294 Ill. 333. The basis of the commitment, as it appears from the order, is that defendant consumed the time of the court in giving the false testimony, and that his attitude and misrepresentation tended to lessen the dignity of the court. The testimony given was in response to questions asked by the court or permitted by it to be asked by counsel on a matter not shown to be material. The record shows nothing as to defendant's attitude tending to lessen the dignity of the court. The contempt, if any, must rest on the giving of false testimony as to an immaterial matter. This does not constitute contempt. Ex Parte Hudgings, 249 U. S. 378; State v. Meese, 200 Wis. 454, 460; and People v. LaScola, 282 Ill. App. 328, 332.

The order is reversed.

REVERSED.

Feinberg, P. J., and Tuohy, J., concur.







J. M. HANSEN, P. R. HANSEN,  
M. C. KRAMER, and H. E. BENDA,  
doing business as Hansen and  
Matson Company,

Appellants,

V.

NICK SAMARCHUK, also known as  
NICK SAMAR, and JOSEPH JAMES  
LOSCHIAVO,

Appellees.

APPEAL FROM SUPERIOR COURT  
COOK COUNTY

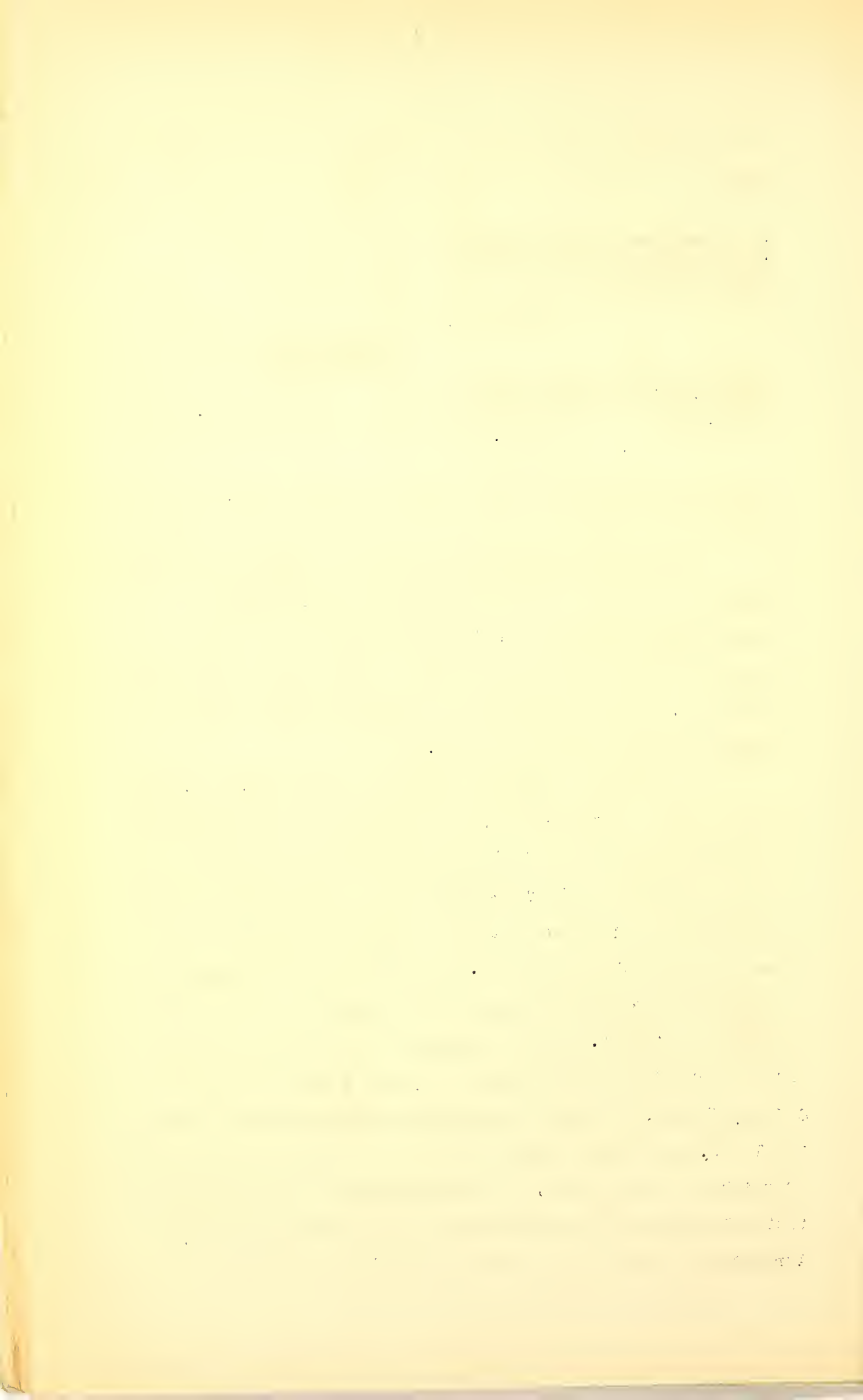
336 I.A. 151<sup>2</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs, engaged in the sale of butter, eggs, etc., appeal from an order denying a temporary injunction restraining defendants from soliciting customers of plaintiffs formerly served by them as employees of plaintiffs, and from an order striking the amended complaint and dismissing same for want of equity.

The amended complaint consists of two counts, identical in every respect except as to the name of the defendant complained of, the date of his membership in the labor union with whom plaintiffs contracted, and the date of termination of the employment of the respective defendants and the reason of such termination. The motion for temporary injunction was based solely on the complaint and defendants' motion to strike it. This complaint alleges that on May 1, 1947 plaintiffs entered into a written contract with the Coffee, Cheese, Butter and Egg Drivers and Salesmen's Union, Local 772, effective until October 1, 1948, under the terms of which it was provided, in Article 16, that "It is agreed that all employees working under the jurisdiction of this Agreement, shall for a period of one (1) year after







2.

Employer and employee sever their connection in any way, refrain from soliciting, delivering or selling, directly or indirectly, orders for butter, eggs or any merchandise (carried by his former Employer) from the customers on the records of the former Employer which have been in charge of or attended by said employee"; that each of the defendants were then, and for many years prior thereto had been, members of the union in good standing; that they were then, and for a long time prior thereto had been, employees of plaintiffs; that they had knowledge of the above mentioned contract and accepted the benefits of it in all particulars; that the defendant Samarchuk was discharged November 24, 1947 for cause, and that the defendant Loschiavo left the employ of plaintiffs without cause on January 9, 1948; that since the termination of their employment each of the defendants has gone into business for himself and was soliciting customers of the plaintiffs formerly served by him, and that by reason thereof plaintiffs were sustaining "a large amount of damages, the exact amount of which cannot be ascertained," etc.

The principal ground of the motion to strike was the alleged failure of the complaint to show authority in the labor union to contract with defendants in respect to defendants' personal rights to solicit the customers of plaintiffs after leaving plaintiffs' employment. The allegations of the amended complaint conform substantially to the allegations of the complaint in Western-United Dairy Co. v. Nash, 293 Ill. App. 162, where the right to an injunction was upheld, except that in the complaint before us there are no allegations in respect to the constitution or by-laws of the union or an agreement on the part of defendants as union members to be governed and act in accordance







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with all the by-laws, rules and agreements entered into by the majority of the members of the union. There is, however, an allegation that defendants, having knowledge of the contract between plaintiffs and the union, accepted all the benefits of the contract. Since a person cannot accept benefits of a contract without subjecting himself to its burdens, the complaint sufficiently alleged acquiescence in and acceptance of the contract by the defendants. This allegation, if true, obviates the necessity of the prior grant of authority to the union to contract for its members in respect to the matter before us. The complaint therefore stated a good cause of action and the court erred in striking it and dismissing the suit.

The orders appealed from are reversed and the cause remanded with directions to proceed in conformity with the views expressed herein.

REVERSED AND REMANDED WITH  
DIRECTIONS.

Feinberg, P. J., and Tuohy, J., concur.







44460

ALVIE D. KILLIAN,  
Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY,  
a corporation, and P. R. MALLORY &  
CO., INC., a corporation,  
Appellants.

APPEAL FROM SUPERIOR  
COURT COOK COUNTY

337  
336 I.A. 152

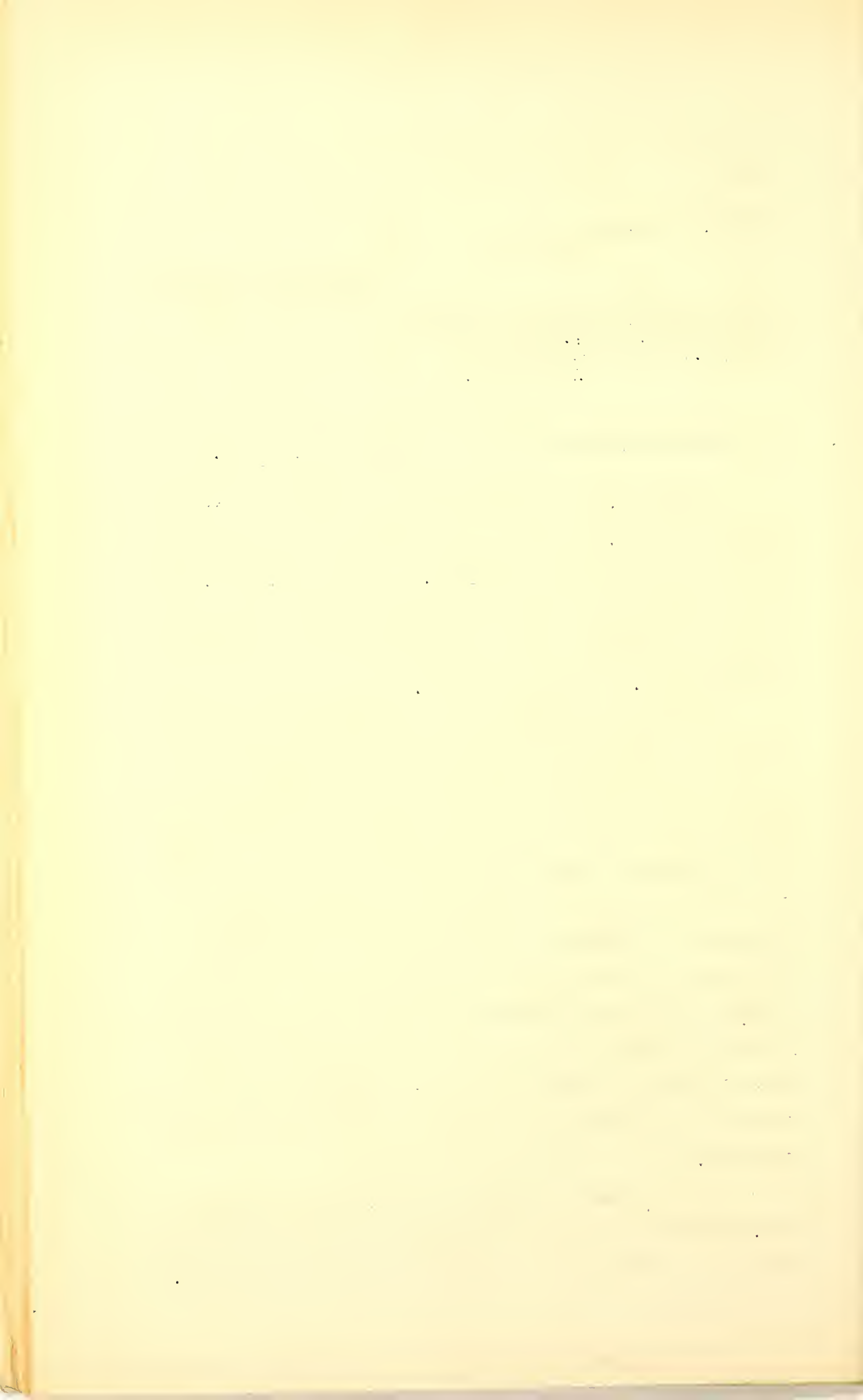
MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a conductor employed by The Pennsylvania Railroad Company, a corporation, brought suit against the railroad company and against P. R. Mallory & Co., Inc. to recover damages for injuries sustained by him while in the employ of defendant railroad company on the premises of defendant P. R. Mallory & Co., Inc.

Plaintiff contends that the railroad company was guilty of negligence in (a) not affording plaintiff a safe place to work, and (b) by reason of the failure of the train crew, consisting of engineer, fireman, two brakemen and the plaintiff conductor, to keep a proper lookout for obstacles on the track ahead; that by virtue of such negligence on the part of defendant railroad company plaintiff, who was riding the forward car of a switching movement in and upon defendant Mallory's plant, sustained injuries when he was caught between the side of the car on which he was riding and an oil drum negligently placed so close to the track by the defendant Mallory as to preclude clearance.

The accident happened at about 4:00 P.M. July 18, 1945. Plaintiff was the conductor in charge of a switching movement consisting of an engine and a loaded car of coal.







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The Mallory premises, located in Indianapolis, Indiana, were enclosed and the train acquired access to the plant and spur track through a gate in a wire fence which was opened by an employee of Mallory Company. Approximately two car lengths from the gate is a street extending east and west called Moore Avenue which was completely enclosed by the Mallory Company's fences, but over which pedestrian traffic proceeded across the spur track to and from various parts of the plant. The engine pushing the loaded coal car entered the premises from the east, followed a curve in the track to the north, and proceeded past Moore Avenue, which it intersected at approximately right angles, between two buildings on either side of and adjacent to the spur track to a point where an empty car was standing on the track. This empty was coupled on to the train and was pulled out of the plant and into The Pennsylvania Company's yard. One of the brakemen who had accompanied the movement stayed with the empty, and the remainder of the crew proceeded again into the Mallory plant pushing the loaded coal car ahead of the engine. On the occasion of the first entry of the movement the plaintiff noticed several steel barrels or drums containing, or which had contained, fuel oil, in close proximity to the tracks. Fearing that there was not clearance for the movement, he directed an employee of Mallory, one Larry Turner, a private policeman, to have the oil drums removed from the position they occupied on or near the track. When the movement proceeded the first time to pick up the empty coal car the plaintiff walked from the end of the train past the offending barrels to the point where the coupling was to be made between the loaded coal car and the empty coal car,







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and then safely rode the movement out, standing between the two cars on the east side of the train or on the side opposite to where the barrels were located. As the train passed Moore Avenue with the empty coal car the plaintiff stepped or walked to the west side of the track and maintained a watch to prevent trucks or pedestrians from entering upon or crossing the tracks while the switching operation was in progress. As the train approached Moore Avenue, after having deposited the empty outside the plant, plaintiff was standing on the west side of the track in the immediate proximity of the impending drums of oil. His testimony on this phase of the case is important and we quote verbatim from the cross-examination by Mr. Dooley, abstract pp. 89, 90:

"Q. Did you look at the barrels then? A.

No, sir.

"Q. You didn't look to see whether or not the train could pass there? A. They passed there once.

"Q. I am asking you if you looked to see whether this train, the oncoming train, could pass there? A. No.

"Q. Now, you were on both the east and west side of this track, is that right? A. That is right.

"Q. You would be on the side of the track—you had been on the side of the track where you say these barrels were, is that right? A. That is right.

"Q. There wasn't anything to obstruct your view there, was there? A. There wasn't.

"Q. And you were standing near where these barrels were? A. That is right.

"Q. As I understand it, you were about ten or twelve feet from where these barrels were? A. I should say approximately; I don't know; that is about right.

\* \* \*

"Q. So then this loaded car was being shoved







4.

in there, is that correct? A. That is correct.

"Q. Then as it passed you, you hopped on it?  
A. That is right.

\* \* \*

"Q. I suppose you got on the northwest corner,  
is that correct? A. On the northwest corner.

"Q. And did you look at all then to see  
whether the barrels were on or off the track?  
A. I did not.

"Q. Did you pay any attention whatever  
to the barrels before you got on the train?  
A. I did not.

"Q. Did you at any time see these barrels  
before you felt them? A. Just about the time  
I got--just about the time they struck me.

"Q. Well, that is the first notice you had  
of them? A. I got my left leg up around the  
end of the car.

"Q. This was still broad daylight, wasn't  
it? A. Four-twenty P.M."

It thus appears that the plaintiff, standing in full view of the impending barrels at a distance of not more than ten or twelve feet, boarded the train at Moore Avenue by placing his foot in the stirrup of the lead end of the loaded coal car and his hands upon the grab handle, and while in this position and while the train was proceeding at a rate of speed of not more than two or three miles per hour the injury to his leg occurred. At the time of the accident plaintiff, according to his <sup>own</sup> testimony, was in complete charge of this switching operation.

We shall consider the liability of the respective defendants in the order in which they appear in the title of the cause: first, as to The Pennsylvania Railroad Company. It is to be observed that the relationship of employer and an employee existed between the plaintiff and this defendant, that the question of liability is to







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be determined under the provisions of the Federal Employers' Liability Act and that under the provisions of that Act contributory negligence is not a defense, but an element to be considered only in mitigation of damages. Therefore, if this defendant is guilty of any negligence which caused or contributed to cause plaintiff's injury, the verdict of this jury must be upheld, and if the converse is true, it must be set aside.

Plaintiff's contentions against defendant railroad company summarized are (1) that it failed in its obligation to use reasonable care to afford plaintiff a safe place to work, and (2) that the injury sustained by plaintiff was occasioned by the negligence at least in part of employees of this defendant other than plaintiff.

In analyzing the first contention it is to be borne in mind that there is no complaint made of any dangerous condition in the premises other than the fact that these oil drums had been placed in a position dangerous to one attempting to pass on the side of a moving train and were not moved at plaintiff's request. It does not appear that the railroad company had any duty to maintain the premises in question, which was owned and maintained by the defendant Mallory Company. The only theory upon which the railroad company could be charged with failing to use reasonable care in affording plaintiff a safe place to work was in the failure to keep this track clear of impedimenta. At the time and place of this accident, according to his own testimony plaintiff himself was the agent of the railroad company charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or







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X an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties. That he recognized his obligation in this respect is indicated by the fact that he directed the watchman employed by the defendant Mallory Company to remove the offending barrels the first time the train proceeded down this portion of the track. If he had followed up his directions to the policeman to remove the barrels by an inspection it would have been apparent that they had not been removed. While contributory negligence constitutes no defense under the Federal Employers' Liability Act, nevertheless some underlying act of negligence on the part of the employer must be established before he is liable to the servant. The plaintiff has proven no negligence on the part of the railroad company in the care used to afford plaintiff a safe place to work.

In support of his second contention that the injury sustained was occasioned by the negligence of the servants of defendant railroad company plaintiff cites Rule 106 which provides as follows:

"Both the conductor and engineman [sic] are responsible for the safety of the train and the observance of the rules and under conditions not provided for by the rules must take every precaution for protection";

and Rule 1507 which was read into the record as follows:

"Maintain lookout in the direction engine or car is moving, to avoid coming in contact with structures alongside of or over tracks, or with cars, engines or trains on an adjacent track. \* \* \*"

We are unable to determine from the abstract or the record whether Rule 1507 applies to both the conductor and enginemen or merely to the man in charge of the movement; however, we shall





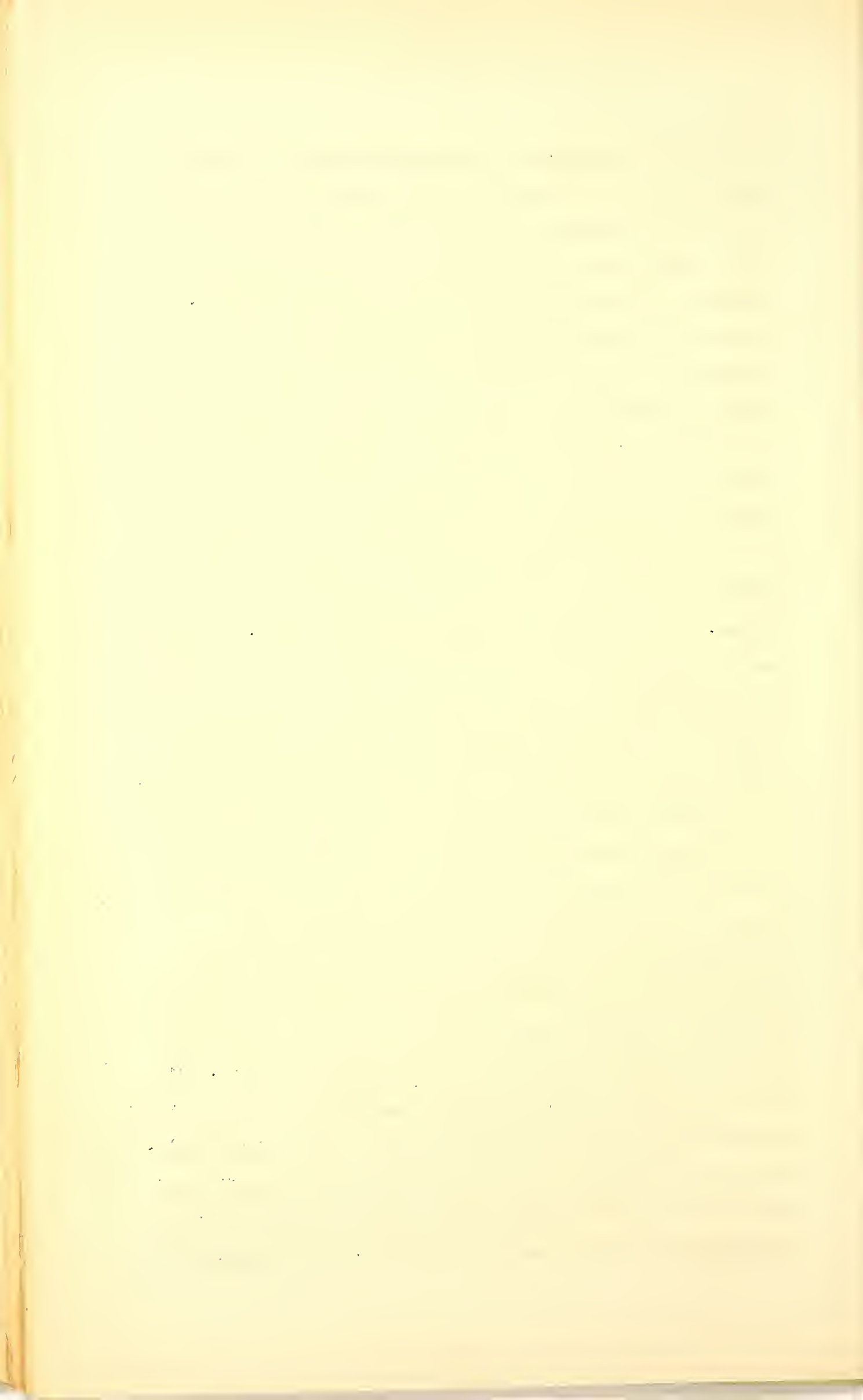


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assume for the purpose of this opinion that it refers to both conductor and enginemen. The argument is made that the railroad company was negligent through the acts of its servants other than plaintiff in not observing the position of danger in which plaintiff placed himself.

In order to properly appraise this contention it is necessary to revert to certain pertinent facts. As this train approached Moore Avenue after having disposed of the empty car, plaintiff was standing on the west side of the track at the north end of the arc made by the curve in the tracks from the Mallory Company's gate to Moore Avenue. He was standing, according to his own testimony, within either ten or twelve feet of the transgressing barrels or drums. It was a clear, bright, July afternoon. Plaintiff had an obligation to see that the barrels had been removed and was standing in such a position that he could not have failed to have seen the location of these barrels had he looked. The fact that he may have been required by company rule to have guarded the Moore Avenue crossing did not, in view of the circumstances in this case, prevent him from observing the condition of the track ten or twelve feet away. It is not apparent from the record just what opportunities the other members of the crew had at this time to observe the position of the barrels. One brakeman was on the opposite side of the car, whether on the front or rear car does not clearly appear from the record. It is to be assumed that the engineer and fireman were at their places at the right and left side of the cab respectively. There is considerable question, in view of the curve upon which the train was approaching, whether the engineer and brakeman could clearly see the barrels. The fireman and







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plaintiff were on the same side of the engine, but whether the former was keeping a lookout from the cab or whether he was engaged in some other duty in the cab does not appear from the evidence. It could hardly be considered negligence on his part, however, knowing plaintiff to be riding the front end, if he were engaged in firing the boiler or some other required duty within the cab. In view of the silence of the record on these questions we can indulge in no speculations upon which to predicate a finding of negligence. It is certain that the plaintiff was in a position to ascertain where the barrels were located and that he had an obligation to see that they were in such position as not to afford danger to the engine or the crew. Without any intimation to the crew, as far as the record discloses, plaintiff stepped upon the stirrup of the lead car as the train reached him and within an interval of a few feet was injured. Under these circumstances we do not believe that there was any negligence on the part of the railroad company separate and apart from the negligence of the plaintiff.

We are of the opinion that the plaintiff should not claim damages for injuries resulting from a dangerous condition which, by omission to do his duty, he himself creates. In Hylton v. Southern Railway Co., 37 F.(2d) 393, (Circuit Court of Appeals, Sixth Circuit), plaintiff's intestate was killed in a derailment of his train when he failed to properly manage a brake valve in the engine, and the court said at page 395:

"We conclude, therefore, as in our former opinion (37 F.(2d) 843, at page 845), 'that Hylton's general disobedience of the 19 order and his specific and voluntary release of control because he had misjudged the distance of the danger constituted







the sole efficient cause of the disaster.' \* \* \*

"Our former decision and the cited cases are said to rest upon the doctrine that an employee may not recover under the Federal Employers' Liability Act [45 U.S.C.A. §§51-59] if he disobeys 'specific orders or standing rules, promulgated for his own safety.' *Paster v. Pennsylvania R. Co.*, supra; *Miller v. Central R. Co.*, supra; *Van Derveer v. Delaware, L. & W. R. Co.*, supra. In such circumstances the employee's disobedience is regarded as primary negligence, *Miller v. Central R. Co.*, supra (C.C.A.) 58 F.(2d) 635, at page 637; as 'the sole proximate cause of the injury,' *Louisville & N. R. Co. v. Davis*, supra (S.C.A.) 75 F.(2d) 849, at page 851."

There is no proof in the record that any member of this crew in the exercise of due care could have prevented this injury after the plaintiff voluntarily and suddenly placed himself in a position of danger, the presence of which he was in the best position to judge. We are of the opinion that even though the other members of the crew might have determined the presence of a dangerous instrumentality adjacent to the tracks, that they were not required, in the exercise of ordinary care, to anticipate that the plaintiff would thrust himself into such a position of danger. We agree with the reasoning in the case of *Eckenrode v. Pennsylvania R. Co.*, 71 F. Supp. 764, wherein, considering a somewhat similar state of facts, the court said at page 768:

"The plaintiff contends that if Sunderlin [the engineer] had kept a continuous watch upon Eckenrode [the plaintiff, brakeman] he would have seen him pick up sand and approach the engine. Undoubtedly he would, but even so, it can hardly be argued that it would have been incumbent upon him to stop the train movement at that point, and it would have been absurd for him to have warned Eckenrode that the train was moving and that the wheels were slipping from time to time, or to have explained to him that it would be dangerous for him to get his head too close to the driving wheels. Negligence can never be established merely by showing that had the actor acted otherwise no accident would have happened. On such a theory it would be negligence to have started the train at all."







10.

In the case of Davis v. Hand, 290 Fed. 73, (Circuit Court of Appeals, Eighth Circuit), the court said at page 78:

"Another ground for recovery urged by the plaintiff below was the fact that the defendant maintained the coal bin so close to the track that it would not clear a man on the side of a passing car. Whether or not this is negligence depends upon the facts of each case. The evidence discloses here that the spur was not a busy one. It was not a through track, and was not used for general switching, or for any purpose other than for storing the occasional car of coal that stood there until unloaded. The deceased had several times performed the only operation for which this track was used, and must have been thoroughly familiar with the clearance and other physical surroundings. It is not contended that it was necessary for the plaintiff to ride on the side of the car. For these reasons we hold that in this case there was no negligence on the part of the defendant and no question for the jury. \*\*\*"

X We hold that there being no negligence on its part, plaintiff may not recover from defendant, The Pennsylvania Railroad Company.

As to the defendant P. R. Mallory & Co., Inc. plaintiff urges that the question of contributory negligence in this case was a question of fact which was properly submitted to the jury. The rule is well stated in Lasko v. Meier, 394 Ill. 71, cited by the plaintiff, where our Supreme Court said, at page 79:

"Appellant further contends that the court erred in not directing a verdict in his favor, for the reason, as he says, that the plaintiff was guilty of contributory negligence as a matter of law, in failing to warn the driver of the approach of the other automobile. The question whether a plaintiff has been guilty of contributory negligence is ordinarily and pre-eminentlly a question of fact, upon which he is entitled to have the finding of a jury. It can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence. \*\*\*"

In the instant case the facts are not disputed. They have been fully reviewed here. Plaintiff admits that although he







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was standing only ten or twelve feet from this position of danger and although he had a duty to maintain a lookout in the direction his train was moving, that he did not look before boarding the train to see whether the barrels were on or off the track and that he paid no attention to the barrels before he got on the train, although he had previously had warning that the barrels were so close to the track as to prevent clearance. In Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, where plaintiff drove her automobile across a bridge into a volume of dense, black smoke and while their view was blocked by this smoke was struck by another automobile, then got out of her automobile to see what caused the collision and was struck by a third car, the Supreme Court holding that she was guilty of contributory negligence as a matter of law said, at page 275:

"\*\*\* Although it is true that the question of contributory negligence is ordinarily a question of fact for the jury, yet when there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. (Wilson v. Illinois Central Railroad Co. 210 Ill. 603; Beidler v. Branshaw, 200 id. 425.) In the instant case there is no conflict in the testimony. According to defendant in error's own testimony she left a place of safety upon the sidewalk, and, as she styled it, 'carelessly' went into a dangerous place, knowing the danger of such a course, 'without thinking about it.' The record is entirely devoid of any evidence showing or tending to show any act on the part of defendant in error which might prove, or tend to prove, any exercise of ordinary care or any attempt on her part to use such care for her own safety.

"At the close of plaintiff's testimony, and at the close of all the testimony, plaintiff in error asked the court to instruct the jury to find the defendant not guilty. When the evidence is all considered, together with all the reasonable inferences to be drawn therefrom, in its aspect most favorable to defendant in error, we are constrained to say that she failed to prove one of the three essential elements of her case, -- i.e., that she was in the exercise of ordinary care for her own safety. The court should have instructed the jury to find the defendant not guilty."







12.

In Prill v. City of Chicago, 317 Ill. App. 202, the court said at page 211:

"The purpose of looking, as an act of caution, is to determine what one shall safely do next; ordinarily this will be to move or to stand still; hence the looking must be done when and where one can act safely with reference to any danger observed, otherwise the act of looking is minus the element of caution. \*\*\*"

In Keele v. Atchison, T. & S.F. Ry. Co., 258 Mo. 62, (167 S. W. 433), the court said at page 80:

\*\*\*\* Self-preservation is nature's first law and nature's imposed duty. Every man lives, moves, and has his being within that law and duty. He cannot escape therefrom if he would, and ought not if he could. Not to obey that law and use one's own God-given senses in as primal a duty is tantamount to casting the whole burden of saving one's life or limb on the other party. Why should that be done? We cannot well write the law to be that everyone owes to A the duty to preserve A's life or limb, except A himself."

See Greenwald v. B. & O. R. R. Co., 332 Ill. 627; Schlauder v. The Chicago and Southern Traction Company, 253 Ill. 154.

Under the circumstances of this case we hold that all reasonable minds in the exercise of a fair and honest judgment would be compelled to reach the conclusion that the conduct of plaintiff in this case toward defendant, P. R. Mallory & Co. Inc., was negligent and proximately contributed to his injury.

For the foregoing reasons we hold that the trial court should have directed the verdict requested in favor of The Pennsylvania Railroad Company and P. R. Mallory & Co., Inc., and for failure so to do, said cause as to each defendant is reversed.

REVERSED.

Feinberg, P. J., and Niemeyer, J., concur.







44536

JOSEPH SIMON, LOU RIVKIN, SOL  
RIVKIN, MELVIN KRAEVTZ, MAURICE  
MENKE, d/b/a J & M DISTRIBUTORS,  
Appellees,

v.

STANDARD ACCIDENT INSURANCE  
COMPANY, a corporation,  
Appellant

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

336 I.A. 153

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Joseph Simon, Lou Rivkin, Sol Rivkin, Melvin Kraevtz, Maurice Menke, d/b/a J & M Distributors, brought suit to recover for loss resulting from burglary under the terms of a policy of insurance issued by defendant covering a stock of merchandise located on plaintiffs' premises at 1511 Lawrence Avenue, Chicago, Illinois. The cause was tried by the court without a jury and a judgment was entered against the defendant in the sum of \$3,020.00.

Defendant contends that it is not liable to plaintiffs for any amount under the terms of its policy by reason of plaintiffs' failure to comply with the following condition of the policy contract: "The company shall not be liable for loss or damage: Unless records are kept by the assured in such manner that the company can accurately determine therefrom the amount of loss or damage." Defendant maintains that the records were so kept that it is impossible to determine the amount, if any loss resulted from the burglary.

Plaintiffs are engaged in the business of wholesale jobbing of merchandise attached to punch boards. The items







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on the boards varied, and the punch board and the premiums or merchandise were sold as a single item known as a "deal." These "deals" were sold for different amounts depending upon the value and amount of the merchandise.

Plaintiffs employed a bookkeeper who made entries of all purchases and sales. The general ledger and purchase record contained entries of cash receipts, cash disbursements and purchases. Entries in the general ledger were made by the auditor, and entries in the journal, cash receipts, check register and purchases were made by the bookkeeper. Cash sales were recorded in the cash receipts. When a sale was made an entry under the customer's name would be made, duplicate sales slips were made, one given to the customer and the duplicate retained. The inventory was taken every six months, the last one having been taken on July 31, 1945, loss occurring sometime between September 22 and September 24, 1945.

A certified public accountant made monthly examinations of the records. In these examinations the auditor would check to see if all checks and invoices for purchases were recorded. Since sales were based on cash receipts, the auditor used plaintiffs' figures. After proving all of the columns in the various journals the auditor would record the journals, take a trial balance and issue a statement. The auditor also prepared the income tax returns for plaintiffs from the same books and records.

In establishing loss the accountant determined the cost of goods sold, applying a method of accounting termed the gross profit method. The formula used in determining gross profit consisted of adding purchases to the opening inventory and deducting from this total the closing inventory,







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and accepting the resulting figure as the cost of sales. The difference between the cost of sales and the gross sales represents gross profit. This formula can be restated as follows:

GROSS SALES	\$.....
COST OF SALES	
Opening Inventory	\$.....
Plus Purchases	\$.....
Total Opening Inventory And Purchases	\$.....
Minus Closing Inventory	\$.....
Cost of Sales	\$
<hr/>	
Deduct cost of sales from Gross Sales	\$.....
Balance Gross Profit	\$
<hr/>	

Dividing the gross profit by the gross sales, plaintiffs accepted the result as the percentage of gross profit. The accountant in this case applied the formula to the period commencing March 4, 1945, to July 29, 1945, the latter date marking the last inventory prior to the loss, and arrived at a percentage of gross profit of 12.59%. Applying this formula to the period commencing August 1, 1945, which was the first day succeeding the date when the last inventory was taken, to September 22, 1945, the date of the loss, he started with an opening inventory of \$13,428.88. To this figure he added all purchases during the period, totalling \$15,274.69. He next totaled the sales during the same period, which sales receipts totaled \$18,394.96. By the application of the gross profit percentage of 12.59% to the sales receipts, the accountant determined the cost of the goods sold, and by deducting that amount from the sum of the opening inventory and purchases, he found that as of September 22, 1945, the date when the loss occurred,







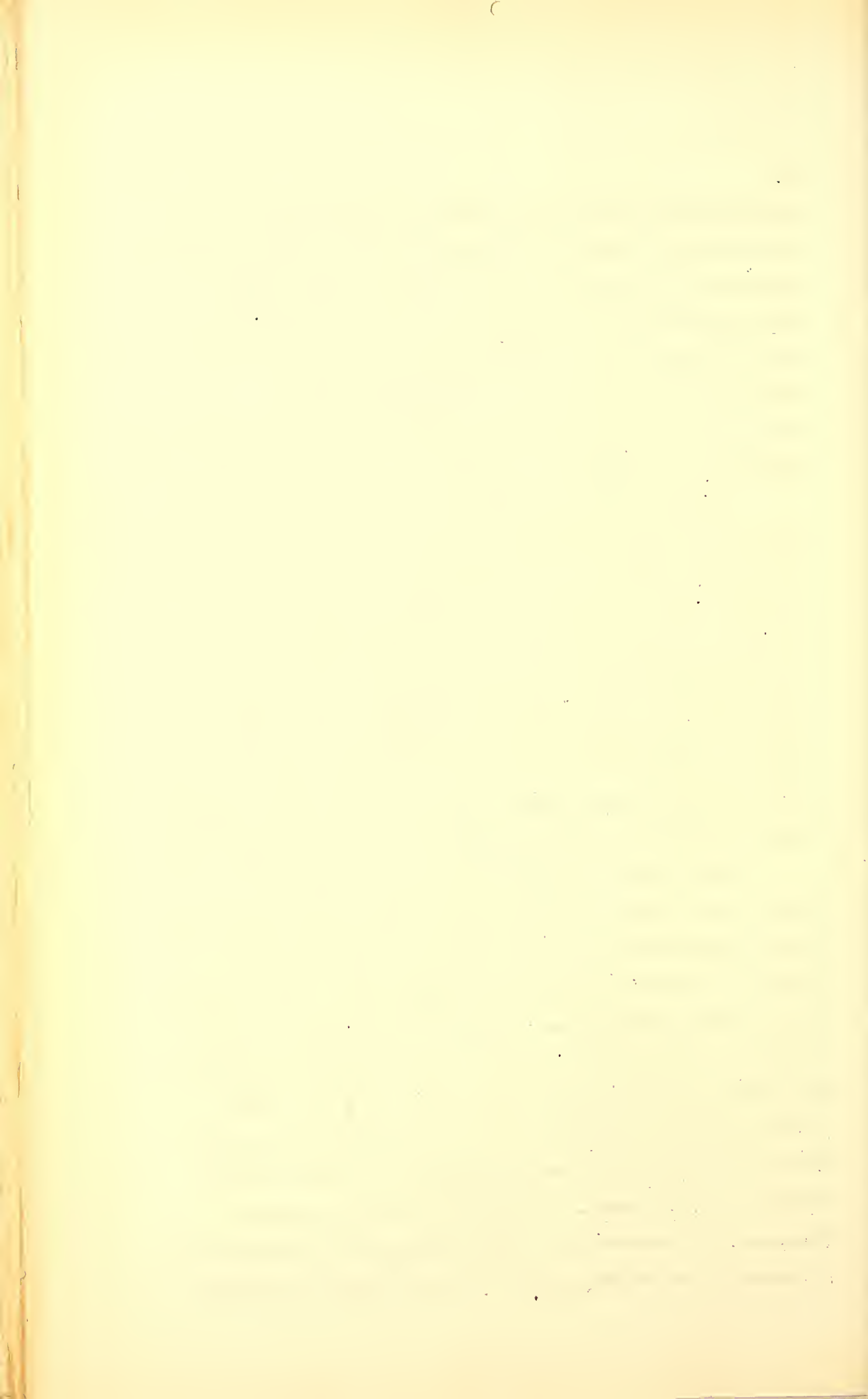
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there should have been an inventory of merchandise on hand in plaintiffs' premises of \$12,624.54. The actual inventory discloses the value of goods on hand to be \$9,604.14. The difference between the amounts shown in the inventory taken after the loss and the inventory figure computed by the auditor to be the value of merchandise which should have been on hand if no burglary had been sustained, is the sum of \$3,020.40. The fact that a burglary occurred was undisputed.

Defendant makes a number of objections to the plaintiffs' method of computing loss which may be summarized as follows: that all of the purchase invoices were not retained so that the purchase records are inadequate; that the sales records were inadequate in that the sales slips were recorded as "deals" did not indicate the individual items sold; that even with the assistance of a certified public accountant the loss could not be accurately determined; that no perpetual inventory was kept and that the plaintiffs could not determine the loss without a perpetual inventory.

There were introduced in evidence as exhibits in this case a ledger containing many hundreds of entries and also an inventory, consisting of nine pages, recording more than two hundred separate transactions. These exhibits have not been abstracted. Counsel for defendant complains that there are certain invoices missing from the exhibits. Examination of the abstract shows that there were three invoices totalling \$821.24 that are missing. As to these three items cancelled checks indicating the names of the sellers were exhibited. It appears that the reason no invoices were procured was because they were purchases made for cash in the "black market." We are unable to say that







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because three of the original invoices are missing, representing five per cent of the total purchases, and where opportunity was afforded the defendant to verify these cash purchases, that the method of keeping the books is/<sup>so</sup> inaccurate as to relieve defendant from liability under its exclusion clause.

Defendant complains that the sales records are inadequate in that they do not indicate the individual items sold. These punch boards containing a number of premiums, varying as to amount and value in specific cases, were sold as a unit. The plaintiffs' business was the sale of completed punch boards which had contained thereon a number of different items. To have listed each and every individual item on a punch board would, in the nature of plaintiffs' business, make the operation expensive. The character of plaintiffs' business required only the listing of the finished article or completed unit rather than the breakdown of all the items constituting a "deal." The defendant knew, or should have known, at the time it entered into the contract of insurance the nature of plaintiffs' business and we feel that complaint for the first time after loss occurs, when all the facts with reference to the method of bookkeeping were ascertainable before, is without substantial merit.

Defendant further objects that no perpetual inventory was kept and that plaintiffs could not accurately determine the loss without a perpetual inventory. While it is true that the loss could more exactly have been determined by a perpetual inventory than by the gross profit method adopted, it appears from the evidence that the method adopted is







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reasonable for the type of business in which plaintiffs were engaged. There is no specific method of bookkeeping which the courts require an assured to keep in order to comply with the policy of insurance. In the case of Kaplan v. United States Fidelity and Guaranty Co., 343 Ill. 44, our Supreme Court said at page 48:

"By its assignment of errors defendant insists upon a strict construction of the conditions of its policy, but in construing policies of insurance the courts are inclined to lean against a narrow construction. (Terwilliger v. Masonic Accident Ass'n 197 Ill. 9; Monahan v. Fidelity Mutual Life Ins. Co. 242 id. 488.) Equivocal expressions in a policy of insurance whereby it is sought to narrow the range of the obligations these companies profess to assume are to be interpreted most strongly against the company. (Niagara Fire Ins. Co., v. Scammon, 100 Ill. 644; Schroeder v. Trade Ins. Co. 109 id. 157.) The contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity. Healey v. Mutual Accident Ass'n, 133 Ill. 556."

In Liverpool and London and Globe Insurance Co. v. Kearney, 180 U. S. 132, in a case on a somewhat similar policy the court said at pages 134, 136:

"\* \* \* 'The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; \* \* \* and, in case of loss, \* \* \* to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void \* \* \*."

"\* \* \* The covenant and agreement 'to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business,' should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were







such as would fairly show, to a man of ordinary intelligence, 'all purchases and sales, both for cash and credit.' There is no reason to suppose that the books of the plaintiff did not meet such a requirement."

In Kaplan v. U. S. Fidelity & Guaranty Co., 255 Ill. App. 437, affirmed in 343 Ill. 44, where the defense was that the plaintiff failed to keep books and records in such a manner that the amount of the loss could be accurately determined, the court said at pages 445, 446:

"\* \* \* The argument of defendant on this point proceeds upon the theory that this condition constituted a warranty rather than a representation, and that the slightest deviation therefrom would prevent a recovery. This is not the law, as appears from the cases already cited. As was stated by the Supreme Court of Minnesota in Olson v. Great Eastern Casualty Co., 149 Minn. 353, it is sufficient compliance with a provision of this sort 'if the books were kept in such a manner that with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained and cash transactions distinguished from those on credits, although it might be slow and difficult to do this.'"

Counsel for defendant relies upon the cases of Cox v. Aetna Casualty & Surety Co., 286 Ill. App. 515, Globe Indemnity Co. v. Cohen, 106 F.(2d) 687, and Gorson v. Aetna Accident & Liability Co., 129 Atl. 590. These cases are authority for the general principle that a provision in an insurance policy such as that relied upon by defendant is valid and that the insurance company has a right to insist upon books which indicate with reasonable certainty the amount of the loss sustained by the assured. There can be no dispute of the soundness of the principle enunciated in these cases, but in our opinion the instant case is distinguishable on the facts from the cases relied upon by defendant. The question presented here is whether or not







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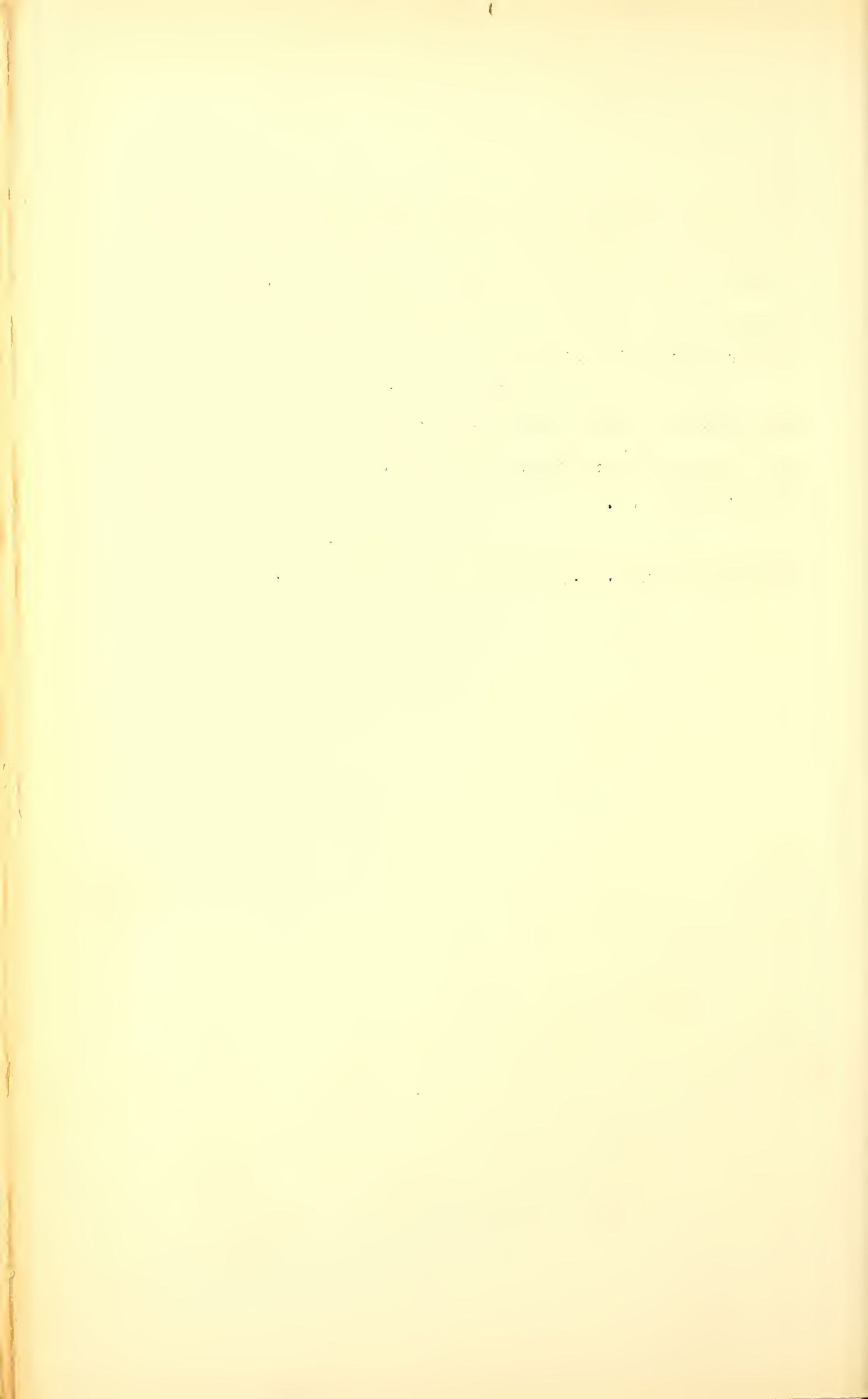
the method adopted of determining loss was accurate within the meaning of this policy. The case was tried by the judge without a jury, and, unless against the manifest weight of the evidence, we would not be justified in setting aside his findings.

After a careful review of the evidence we can not say that the judgment is against the manifest weight of the evidence; therefore, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.







44568

HEINRICH NECHELES, Administrator  
of the Estate of DAVID NECHELES,  
Deceased,

Appellee,

v.

JEFFERSON ICE COMPANY, a corpora-  
tion, and CARL PYLE,  
Appellants.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY

330 I.A. 153<sup>2</sup>

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Heinrich Necheles, Administrator of the Estate of David Necheles, deceased, brought suit against defendants, Jefferson Ice Company, a corporation, and Carl Pyle, an employee, truck driver, for the wrongful death of plaintiff's intestate. The accident happened November 19, 1946 while defendant corporation's motor truck was being driven by defendant Pyle in an easterly direction on 48th Street near the intersection of 48th Street and Kenwood Avenue, both public highways in the City of Chicago. Plaintiff's intestate, ten years of age, operating his bicycle, entered upon 48th Street moving in a southerly direction from an alley on the north side of said highway. The collision occurred when the right front fender of the east bound motor vehicle collided with the bicycle.

The complaint filed consisted of two counts, the second, alleging wilful and wanton negligence, having been withdrawn after the close of the plaintiff's case. The first count charges general negligence and the following particular acts of negligence: failure to warn by sounding horn, negligently operating the truck to the left of the





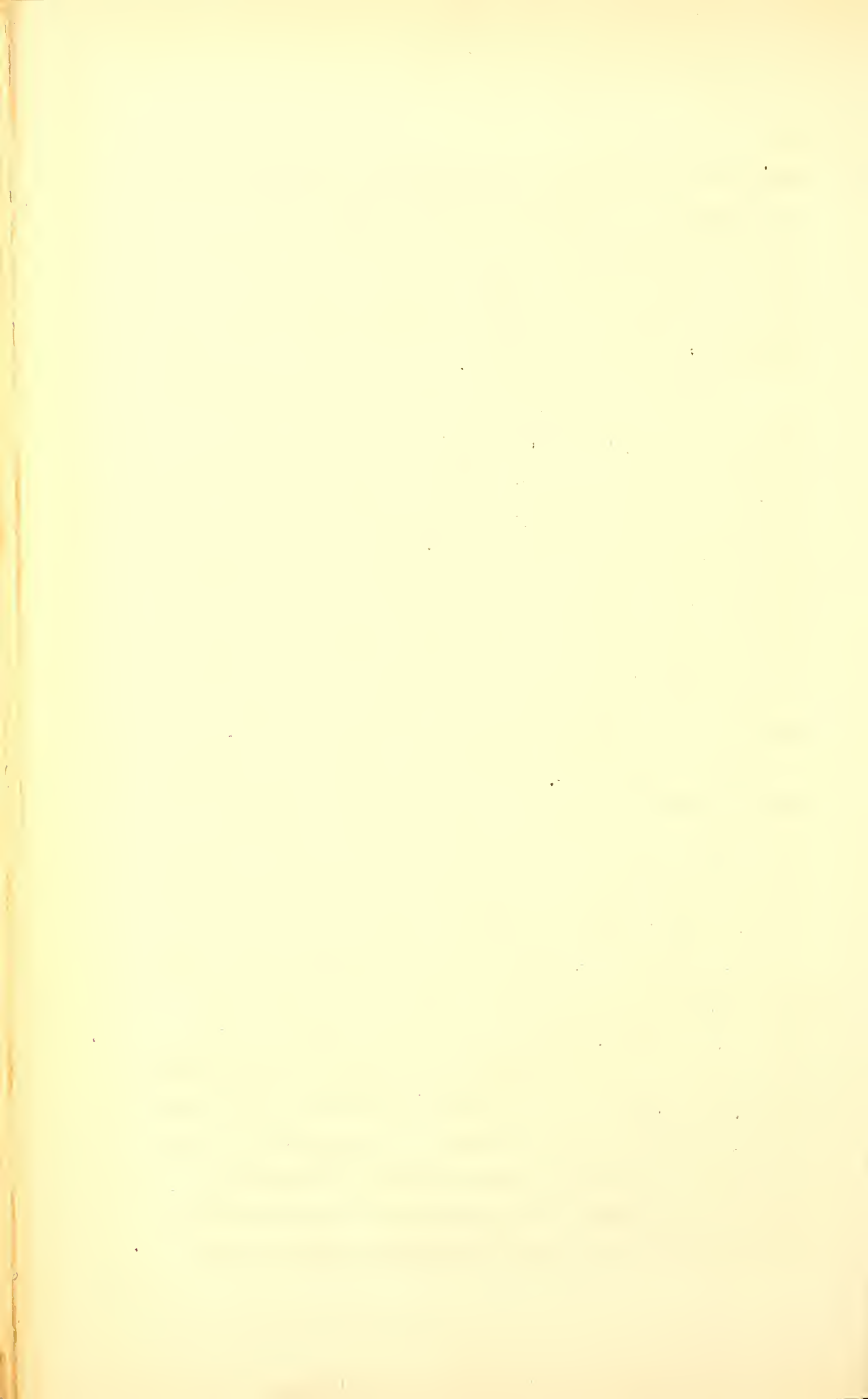


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center line of the road, and operating the truck while under the influence of intoxicating liquor. There was a verdict for the defendants and a motion for a new trial was allowed. Leave to appeal from the order granting a new trial was allowed, and the case has been submitted here on the record, abstract, petition and answer.

The motion for new trial alleges (1) that the jury disregarded plaintiff's evidence to the effect that at the time and place of the accident the truck was being driven on the left hand side of the highway, (2) that the jury disregarded the plaintiff's evidence that defendant Pyle failed to sound the horn of his motor vehicle to give warning of his approach to plaintiff's intestate, and (3) that the jury disregarded the evidence to the effect that defendant Pyle operated the motor vehicle while under the influence of intoxicating liquor. No question is raised as to excessive speed. The trial court in allowing the motion made this brief statement: "In this case, gentlemen, I think that the evidence justifies, and the evidence is such proof that the jury has disregarded the instructions and the evidence in the case, so I believe I shall grant a motion for a new trial." We assume from the statement of the court that the grounds for granting the motion was that in his opinion the jury's finding was not in accordance with the preponderance of the evidence. That this was the plaintiff's contention is borne out by his statement to the effect that "The motion for new trial is wholly on the proposition that the verdict is contrary to the evidence. It is strictly a matter of evidence, and my theory is, in this motion for new trial, that the verdict is absolutely contrary to the







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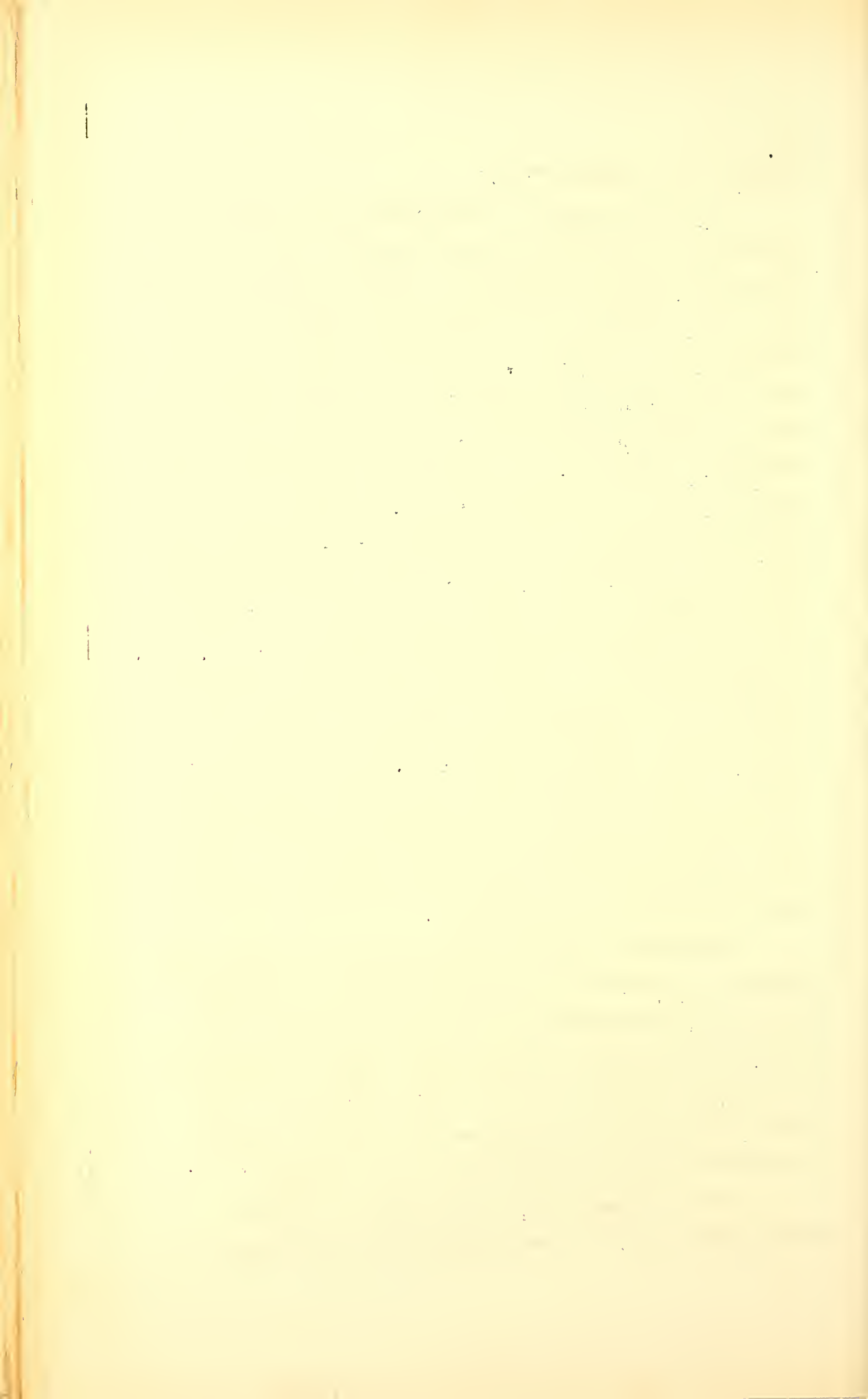
weight of the evidence \*\*\*."

A careful reading of the evidence in this case discloses little conflict upon any material issue. Paul Rasmussen, called as a witness for plaintiff, testified that he was a painter and was engaged in some work in the vicinity of the accident. He stated that before the accident there were several boys riding back and forth on 48th Street; that his attention was called to the accident by the squeaking of brakes; that he went out into the street, saw the rear end of the truck skidding, going east, and saw the bicycle and the boy on the ground; that the weather was clear and the visibility good; that there were cars parked along 48th Street on both sides of the alley out of which the boy came. He was then asked this question: "Q. Now, Mr. Rasmussen, prior to the time that the truck and the bicycle came in contact, did the truck blow a horn, or give any other warning signal? A. Not that I heard." He testified that he saw skid marks extending back from the rear wheels of the truck about fifty feet and that "they were more to the north portion of 48th Street, it skidded toward the center to the north."

Floyd Eddy, a police officer called as a witness for plaintiff, testified that after the accident they measured the skid marks which started from the center and ran over into the north portion of the street, "they were seventy-four feet from the front of the truck, that is where they started going west." He testified that the truck driver was sober but that he detected liquor on his breath.

Defendant Pyle, called under Section 60 of the Civil Practice Act, on cross-examination testified sub-







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stantially that he was employed by the corporate defendant; that he was driving a truck containing two or three tons of ice; that the weather was clear; that he had had three beers from two o'clock in the afternoon until four o'clock, the time the accident happened; that he was driving east along 48th Street and that the boy was about seventy feet in front of him when he first saw him; that he was driving twenty miles an hour and that he could stop his truck in about thirty feet; that he was driving near the center portion of the street; that the street was narrow and that cars were parked along on either side; that when he saw the boy he put on his brakes and cut to the left and turned the truck to the left side of the street, driving in that manner for about fifty feet; that the street is thirty-nine feet wide. The witness was then shown a statement made before the trial containing this question and answer:

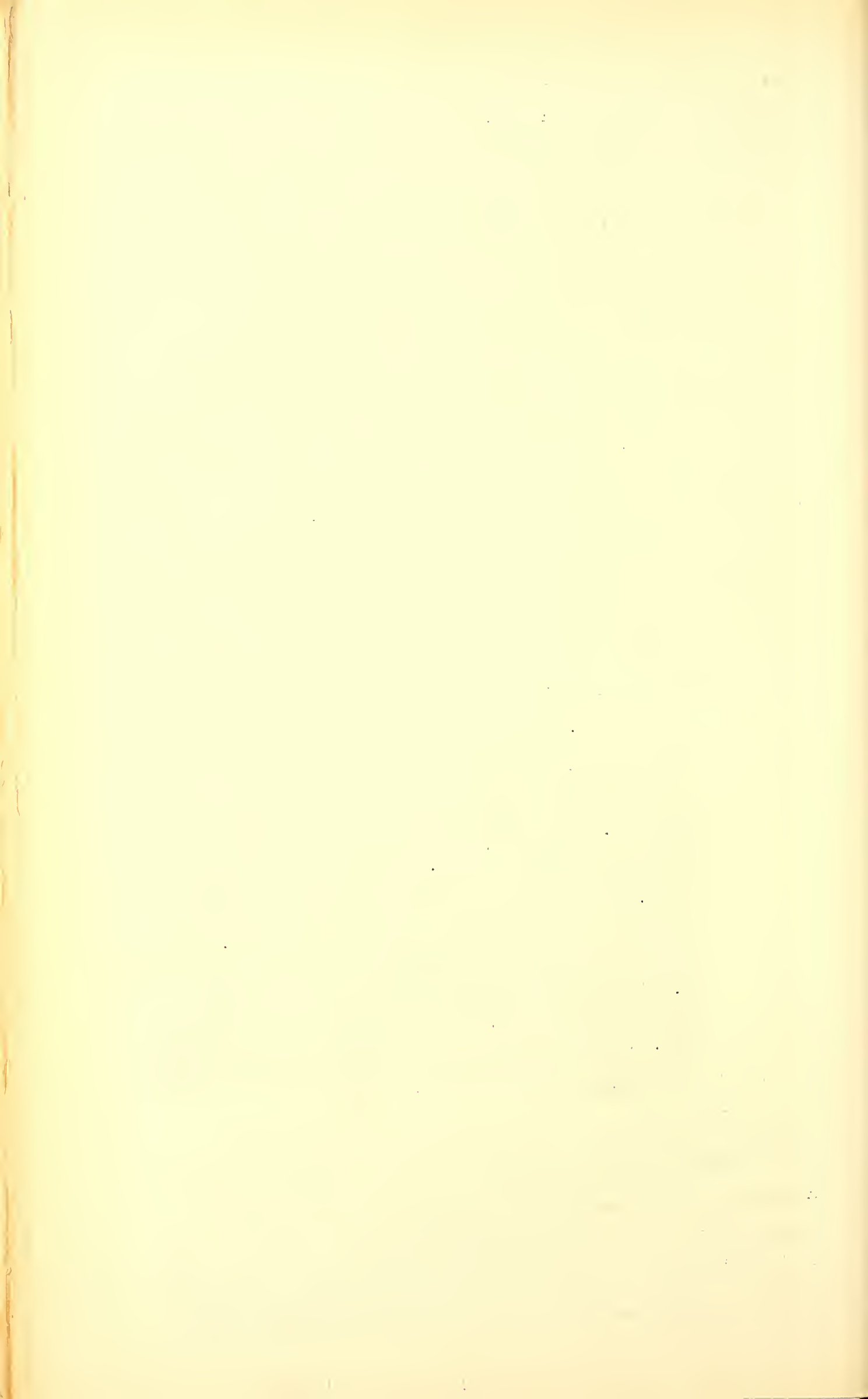
"Question: Now, go ahead in your own way and tell me all you know about it?

"Answer: I had been driving an ice truck south on Kenwood Avenue and when I came to 48th Street I made a left hand turn. I couldn't have been going more than twenty miles an hour. The truck couldn't go over thirty miles per hour at top speed. I saw a boy riding a bicycle coming south in front of me. This boy came out of the alley just east of 1348 E. 48th Street. When I saw this boy coming out of the alley I put on my brakes. The boy had passed in front of me and I put on my brakes, and suddenly the boy made a left hand turn and came right back in front of me. I put on my brakes again, but the right front fender hit the boy. I stopped as soon as I hit him. I got out of the truck and saw the boy lying on the street about two feet in front of the right rear wheel. The bicycle was right with him at this point. \*\*\*"

He stated on the trial that that statement was true.

Elizabeth Schlademan, called as a witness by the defendants, stated that she was going north on Kenwood Avenue (the first north and south street to the west of the place of the accident); that she was pushing a baby buggy; that when she got to the intersection of 48th Street she







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saw four boys on bicycles seesawing back and forth into the alley; that she saw the truck come almost to a standstill as he reached the intersection; that she crossed the street diagonally to enter the alley; that as she entered the alley and got to the sidewalk she heard the screech of brakes and turned "in time to see the child go past me out to the alley entrance turn on his bicycle in front of the truck. He was over on the right in front of the right wheel of the truck, turning his bicycle in some direction"; that the right fender and bumper came in contact with the bicycle; that the truck stopped immediately after the impact; that she was standing by the driver after the accident. Asked about his sobriety, she stated, "I never gave it a thought. Yes, he was not drunk. There was nothing to make me think he was drunk."

Ellen Moore, called as a witness by the defendants, testified that she was standing in about the middle of 48th Street near the alley between Dorchester and Kenwood Avenues talking to a person in a car which was facing east, and stated, "I turned toward the west and noticed a boy on a bicycle making a sort of a loop and I saw him turn in front of the truck. He struck the right front bumper and there was a screech of brakes and when I saw him then he was lying near the back right wheel of the truck. The screech of brakes came before he hit the truck. I heard the screech of brakes first and then I saw the impact."

Barbara Beaudway, called by the defendants, testified that she was a housewife and on the afternoon of the 19th of November was in the vicinity of the accident, near the alley between Kenwood and Dorchester Avenues. She







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states that she did not see the accident but that she observed the truck as it turned the corner from Kenwood to 48th Street and that he was proceeding slowly on the right side of the street.

Mildred Gillough, called by the defendants, stated that she lived in the second floor apartment next to the alley and she was in her living room at the time of the accident; that she heard the screech of brakes and went down and talked to the driver of the truck and that he was sober.

Pyle's testimony in his own behalf was substantially a reiteration of the testimony he gave when called under Section 60.

From the above facts it appears that there was little, if any, conflict in the evidence on any material point. Examination of the charge that defendant drove his truck to the left of the center line of the highway shows that after defendant turned the corner at the intersection of Kenwood and 48th Street from the southerly direction in which he had been approaching 48th Street to the easterly direction in which he proceeded east on 48th Street, he was on the right side of the highway driving toward the center of the thirty-nine foot street; that when the plaintiff's decedent suddenly crossed his path from the alley on the north side of 48th Street to the opposite side of the street, he swerved his truck to the north, or to the north side of the road, in an attempt to avoid the collision with the boy. It further appears that he did not strike plaintiff's intestate until after the latter had cleared the truck and then turned his bicycle back either







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against it or into its path, This evidence appears to be undisputed and it appears that defendant Pyle, in operating his vehicle to the left of the center of the street, did so in an attempt to avoid the accident.

Plaintiff complains that no horn was sounded. The only testimony that we find in the record on this score is that of the witness Rasmussen who appeared on behalf of the plaintiff and who stated that he did not hear a horn sound before the accident. The facts reviewed above indicate that Rasmussen was some little distance from the scene of the accident at the time the collision occurred, that he was standing on the sidewalk on the northeast corner of 48th Street and Kenwood Avenue supervising the painting of a building, and that his attention was first called to the accident by the squeaking of brakes. Under such circumstances it is not improbable that even though a horn had been sounded he would not have heard it. The mere failure to hear is not conclusive that a horn was not sounded. Further, it would appear to have been a jury question as to whether or not the failure to sound the horn, if there was such failure, was the proximate cause of the accident.

The third ground for a new trial, to the effect that Pyle was under the influence of intoxicating liquor, is without foundation in the record. As a matter of fact, plaintiff's attorney, in the presence of the jury, stated "we will stipulate the driver was not drunk." We are of the opinion that no causal connection was shown in this case between the quantity of beer which the defendant Pyle admitted drinking over a two hour period and the accident in question.







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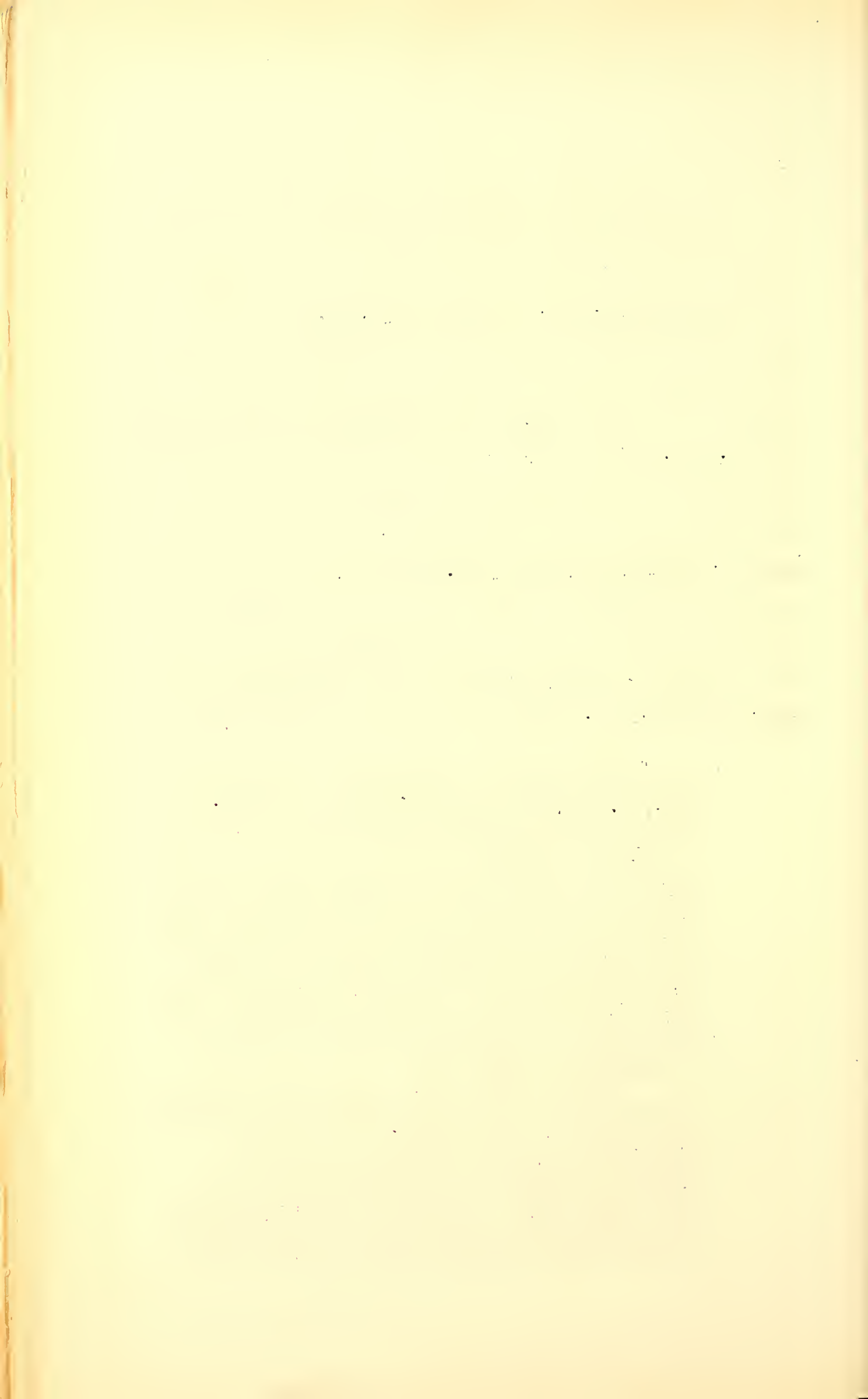
We recognize the salutary rule expressed in so many of our Illinois cases to the effect that motions for a new trial are addressed to the sound discretion of the trial court, Couch, Admx. etc. v. Southern Ry. Co., 294 Ill. App. 490, that reviewing courts are more reluctant to interfere with an order granting a new trial than with an order denying a new trial, Tone v. Halsey, Stuart and Company, Inc., 286 Ill. App. 169, and that the order granting a new trial should not be reversed unless it affirmatively appears that there was a clear abuse of discretion by the trial court, Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402; however, it appears from these cases that the discretion granted to a trial court is not an arbitrary one. In the case of Wettaw v. Retail Hardware Mutual Fire Insurance Co., et al., 285 Ill. App. 394, the court said at page 395:

"The petition is filed under section 77 of the Civil Practice Act, Ill. State Bar Stats. 1935, ch. 110, par. 205, and number 30 of the rules adopted by the Supreme Court in amplification of the statute.

"Prior to such enactment the award of a new trial was not regarded as a final order, and no review of the same was possible. By said section 77, such is now made final, and an appeal may be taken therefrom when leave for that purpose shall be granted by a reviewing court, or by a judge thereof in vacation; hence, obviously, whether a review of such order may be had is a matter which necessarily rests very largely within the discretion of the Supreme or Appellate Court, or by a justice of such court if the application be presented in vacation.

"That the act is designed to promote justice, and to prevent a verdict, warranted by the record and justified by the evidence, from being set aside and lost to the party who was fairly entitled thereto, and such litigant forced to undergo the hazards of another trial with its further incidents of delay and expense, does not admit of argument. We think it clear that where a party litigant feels aggrieved at the order of a trial court in setting aside a verdict in his







favor, and presents to a reviewing court, upon a petition for leave to appeal from such order, grounds which are reasonably debatable and fairly challenge the propriety of the grant of the new trial, the reviewing court should permit the appeal to be taken. Such an interpretation of section 77 is in consonance with justice and in accord with the evident spirit of the act."

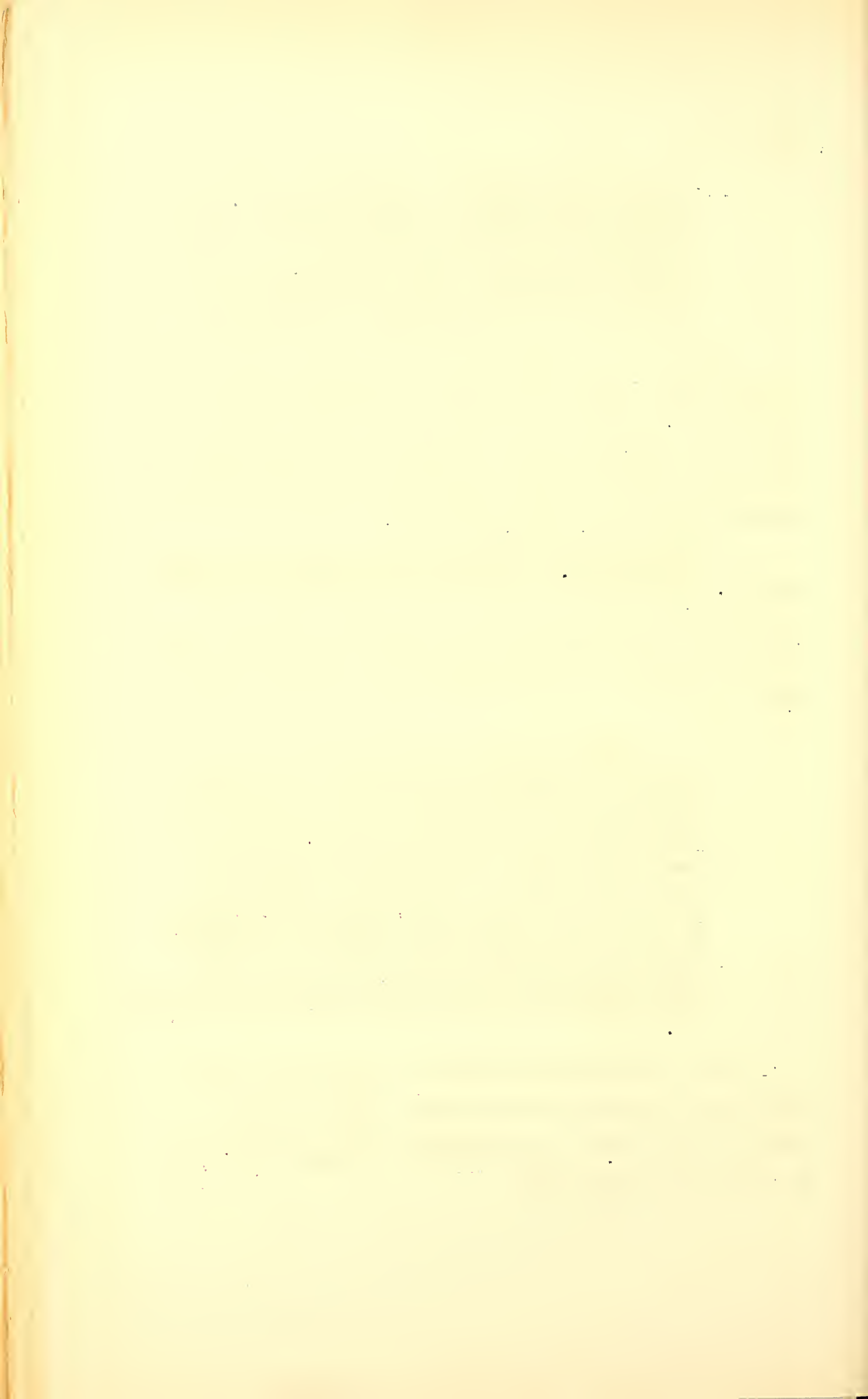
It has long been the rule of law in this State that a trial judge, while he has a broad latitude in setting aside jury verdicts, is not to function as a thirteenth juror, but that his action in granting a new trial should be exercised with reasonable discretion.

In Schneeweisz v. Illinois Central Railroad Company, 196 Ill. App. 248, where the defendant moved for a new trial upon the ground that the verdict was contrary to the manifest weight of the evidence, the court said, at page 258:

"\*\*\* We have no doubt that the evidence presented a question for the jury to determine, and to be determined by the trial court only in passing on the motion for a new trial. If he was then of the opinion that, had the case been submitted to him on the facts, he would have found otherwise, or that if he had been acting as a juror instead of a judge, he would have refused his assent to the finding, it by no means follows that he should have granted a new trial. If such was the position and duty of the trial judge, and no finding of the jury that did not meet his own views of the facts should be accepted, the jury would become an utterly useless part of the trial. \*\*\*"

We do not believe from the evidence adduced in the instant case that any different result would or should result on a new trial. In De Forrest v. Oder, 42 Ill. 500, the court said at page 501:







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\*\*\*\* This court will not reverse, because the verdict is against the evidence, unless it is so clearly so that we must believe that the result would and ought to be different, on another trial by a jury. \*\*\* But, when we have examined all of the evidence, and fail to see that the verdict is wrong, and only have doubts as to its correctness, the court never interferes. \*\*\*\*"

In the case of Illinois Central Railroad Company v. Gillis, 68 Ill. 317, the court said, at page 319:

"If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony."

After a careful consideration of this record we are of the opinion that the jury verdict was amply supported by the evidence, and that there was an abuse of discretion under the facts in this case, in the granting of a new trial. For these reasons the order of the Superior Court of Cook County awarding a new trial is reversed and the cause remanded with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg, P. J., and Niemeyer, J., concur.







336 ILL. APP.

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44372

In The Matter of the Estate of  
HOWARD B. JACKSON, Deceased.

VERNON R. LOUCKS,

. Appellee,

v.

SUZANNE JACKSON and AUDREY  
JACKSON,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

336 I.A. 154

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Howard B. Jackson was the senior member of the brokerage firm of Jackson Bros. & Co., which had thousands of customers. He died on January 19, 1923. The partnership agreement provided that on the death of a partner the fair net value of his share should be determined and the survivors purchase his share at the amount so determined, assuming the partnership debts and obligations. A similar provision was in his will. A few years prior to his death decedent took his nephew, Arthur S. Jackson, into the firm as a partner on a 50-50 basis. Shortly prior to his death several other partners were admitted. Three years before his death his interest was reduced to 25% and Arthur S. Jackson received 37%. In his will Howard B. Jackson designated his wife, Florence May Jackson, and his nephew and partner, Arthur S. Jackson, as coexecutors of his estate. He provided that his wife would receive the income for life and that the remainder should go to Arthur S. Jackson, if living, or if not living, then to his heirs. The will named the Harris Trust & Savings Bank as trustee. Florence May Jackson and Arthur S. Jackson qualified as executors of his estate.



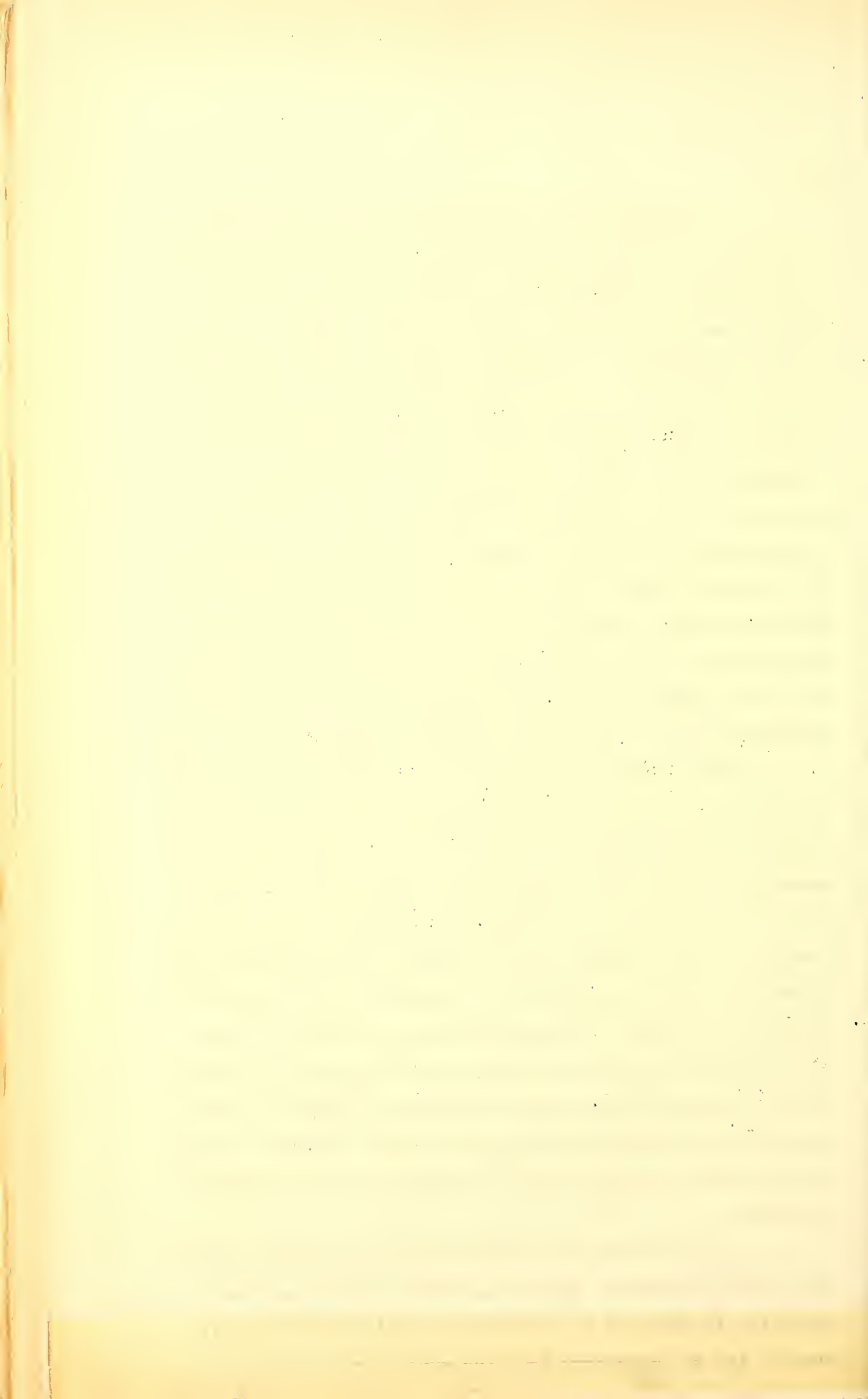




To carry out the provisions of the partnership agreement and the will, two audits were made by two firms of accountants, who independently arrived at the same figure, and the surviving partners paid this amount into the estate with the approval of the Probate Court and assumed partnership liabilities in excess of \$12,000,000.00. The widow employed another firm of accountants who reported to her attorneys, based upon an investigation of the books and accounts of the partnership covering a period of ten years from January 1, 1913 to January 1, 1923, that the value of the interest of the estate of Howard B. Jackson was \$500 less than the figure previously found by the other accountants. The widow was dissatisfied with the reports of the accountants. The three audits showed various accounts designated on the books by a number. She asserted that neither the books or the audits disclosed the owner of the accounts. She also maintained that Arthur S. Jackson, her coexecutor and a surviving partner, refused to account to her by disclosing the ownership of the disputed accounts. Between 1923 and 1927 there were discussions concerning the matter. Mrs. Jackson persisted in her charges and threatened to sue the surviving partners who were carrying on the business, and to also sue important customers. The surviving partners agreed to pay her \$100,000 to settle the matter and avoid having the firm and its customers brought into litigation. Such settlement was made and approved by the Probate Court, but Mrs. Jackson obtained other counsel and had the order for the settlement vacated.

On December 30, 1927 Florence May Jackson, executrix under the will of Howard B. Jackson, deceased, filed a complaint in chancery in the Circuit Court of Cook County, praying for an accounting from the surviving partners and







others. Arthur S. Jackson died on September 28, 1933, leaving him surviving his widow, Lou B. Jackson, and his son, Stanley Jackson. Stanley Jackson died on June 3, 1942, leaving him surviving Suzanne Jackson and Audrey Jackson. Florence May Jackson became the sole executrix and continued in that capacity until her death on June 5, 1946. Thereupon the Continental Illinois National Bank & Trust Company was appointed and qualified as administrator de bonis non with the will annexed and was substituted as plaintiff in the chancery suit. The suit in the Circuit Court did not progress. There were several substitutions of attorneys by plaintiff therein. Eventually issue was joined and the cause was referred to a Master in Chancery. Florence May Jackson paid \$60,000 of her own funds for expenses and fees to various attorneys. She did not seek to recoup this amount from the estate. Immediately after the death of Arthur S. Jackson in 1933 she began to petition the Probate Court and to receive allowances both for attorneys' fees and expenses out of the principal of the estate. She had no interest in the principal assets of the estate, which, under the will, was to go upon her death, together with any accumulated income, to Arthur S. Jackson. In the event of the latter's death the estate was to go to his lawful heirs. After the Probate Court had allowed more than \$60,000 in expenses and attorneys' fees out of the principal of the estate, the court began to show impatience about allowing expenses for the litigation. Shortly prior to September 16, 1942 the attorneys for Suzanne and Audrey Jackson, the grandchildren of Arthur S. Jackson, were served with a notice and a petition and a copy of a proposed order. The petition, by Florence May Jackson, executrix,



1891. The first of the year was a very dry one. The  
winter was very cold. The snow was very deep.  
The spring was very dry. The summer was very hot.

The autumn was very dry. The winter was very cold.  
The spring was very dry. The summer was very hot.

The autumn was very dry. The winter was very cold.  
The spring was very dry. The summer was very hot.

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The autumn was very dry. The winter was very cold.  
The spring was very dry. The summer was very hot.

The autumn was very dry. The winter was very cold.



recited that the attorneys who represented her in the chancery case had withdrawn; that she asked attorney Vernon R. Loucks to represent her and carry on the prosecution of the case; and that the latter had been examining the records and files in the proceedings and consented to represent her on condition that he receive 30% of whatever sums were realized as a result of the proceedings in the Circuit Court and providing the expenses incurred in handling the litigation be paid by her as executrix. She stated that there was then approximately \$40,000 cash in the estate which had not theretofore been turned over to the trustee. She prayed that the sum of \$3,500 be allowed on account of expenses incurred and to be incurred in the prosecution of the case, and that she be authorized to employ Mr. Loucks as her counsel to continue the prosecution thereof on the terms and conditions set forth.

A copy of the proposed order submitted with the petition provided that Mr. Loucks should receive as compensation 30% of any sums recovered and that the executrix was authorized to pay expenses, other than attorney's fees, in connection with the proceedings, but not in excess of the sum to be fixed by the court, and that no amount in excess of the amount so fixed should be paid on account of the expenses without the further order of the court. Presentation of this petition resulted in the entry of an order by the Probate Court increasing the percentage of contingent fee to 33-1/3% and eliminating the provision that the executrix or the estate should pay the expenses other than attorneys' fees. Mr. Loucks, as attorney for plaintiff, prosecuted the chancery case. On December 23, 1946 Vernon R. Loucks, as "counsel for the administrator de bonis non with the will annexed in the estate of







Howard B. Jackson, deceased, in the case of Jackson vs. Jackson et al., pending in the Circuit Court of Cook County, No. B-156351," filed a petition in the Probate Court stating that thousands of pages of testimony had been taken and a large number of exhibits introduced before a special commissioner appointed by the Circuit Court to hear the evidence in the case; that on December 30, 1944 the commissioner filed his preliminary report in which he found that the evidence tended to support plaintiff's contention as to certain specific items; that the commissioner recommended that a decree be entered requiring the defendants, surviving partners, as of January 19, 1923, or the estates of such of them as have died, to account to her for all such accounts as to which the evidence tended to support her position; that on July 12, 1945 the chancellor entered a "memorandum order" directing the commissioner to take additional evidence and to make his final report; that an order was entered in accordance with the "memorandum order"; that after proofs had been closed Florence May Jackson, the executrix, died; that the Continental Illinois National Bank & Trust Company, which became administrator de bonis non with the will annexed, filed its petition in the Probate Court recommending that the proceeding in the Circuit Court be continued to the end that a master's final report be filed in the proceeding; that the Probate Court, having listened to argument, entered an order directing that the cause proceed in the Circuit Court to the end that a master's final report might be filed; that in connection with various hearings before the Special Commissioner expenses have necessarily been incurred; that A. M. Rothbart, a court reporter, performed services and prepared a typewritten record of the evidence at



1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization. This section also outlines the various methods used to collect and analyze data, ensuring that the information is reliable and up-to-date.

2. The second part of the document focuses on the implementation of these practices across different departments. It provides a detailed overview of the procedures followed to ensure that all staff members are aware of their responsibilities and the importance of their role in the overall process. This section also includes a list of the key personnel involved in the implementation of these practices.

3. The third part of the document discusses the challenges faced during the implementation of these practices. It highlights the difficulties encountered in gathering accurate data and the need for continuous monitoring and evaluation. This section also provides a list of the measures taken to address these challenges and ensure the successful implementation of the practices.

4. The fourth part of the document discusses the results of the implementation of these practices. It provides a detailed overview of the progress made and the impact of the practices on the organization's performance. This section also includes a list of the key findings and recommendations for future work.

5. The fifth part of the document discusses the conclusions drawn from the study. It emphasizes the importance of maintaining accurate records of all transactions and the need for continuous monitoring and evaluation. This section also provides a list of the key findings and recommendations for future work.

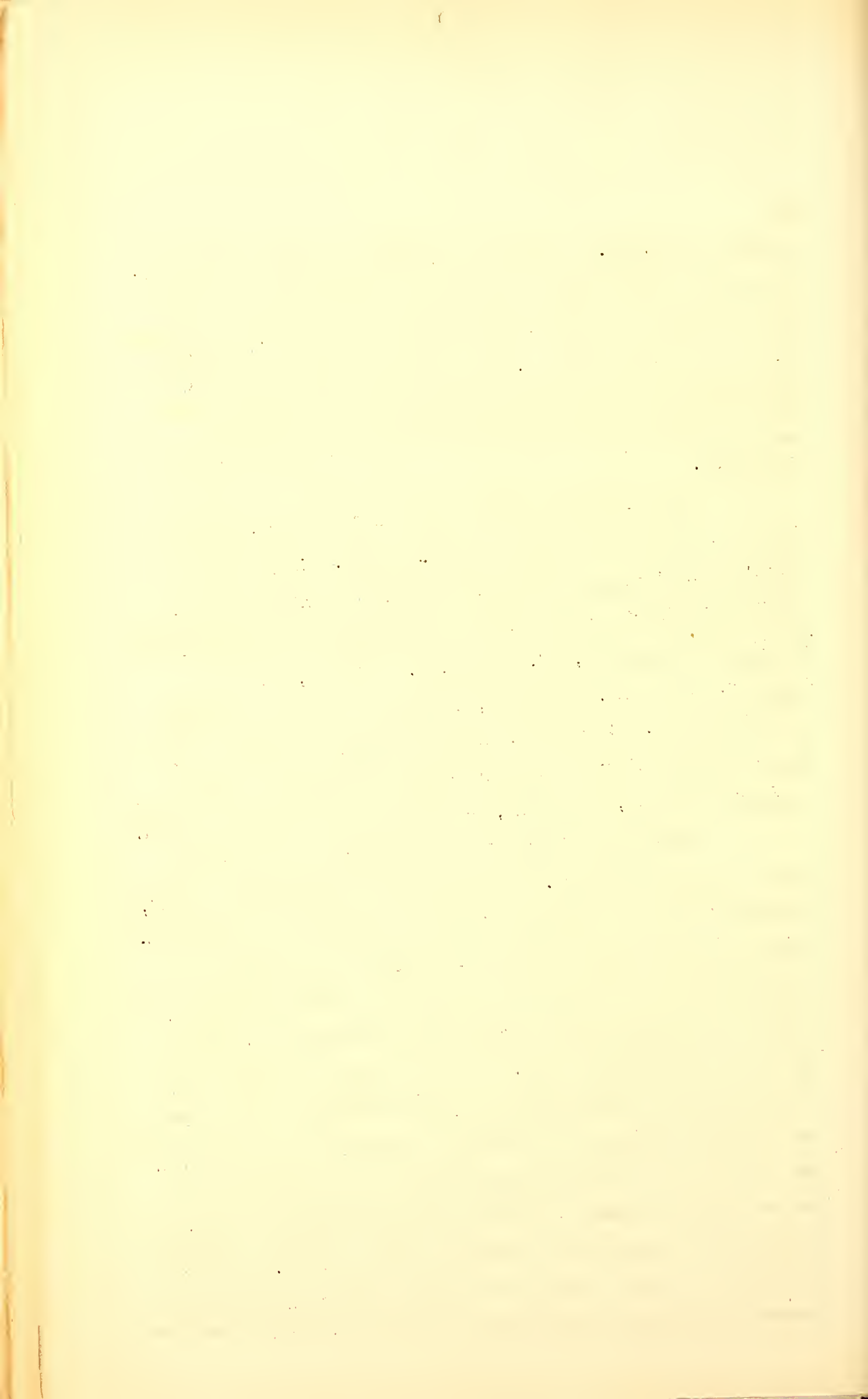


a cost of \$3,006.80; and that in addition thereto other expenses had been incurred amounting to \$2,311.51. He asked that an order be entered directing the administrator de bonis non to pay these amounts. He attached itemized statements and certified that in his experience as a practicing lawyer the charges of the court reporter were fair, reasonable and customary. ✓

In an answer to the petition Suzanne and Audrey Jackson opposed the petition of Mr. Loucks. They did not question the itemized statements attached to his petition. The Probate Court ordered that the administrator de bonis non be directed to pay \$3,006.80 to A. M. Rothbart, the court reporter, and to Mr. Loucks \$2,311.51 for expenses incurred and paid by him. Suzanne and Audrey Jackson appealed to the Circuit Court. There a similar order was entered. Suzanne and Audrey Jackson, appealing, ask that the order be reversed.

The Probate Court did not authorize the filing of the complaint in chancery. By the order subsequently entered, however, that Court recognized that the action was being prosecuted by the plaintiff for and in behalf of the estate. In the instant case we are not called upon to decide whether the Probate Court should have directed the executrix to dismiss the case in the Circuit Court. We find that the prosecution of that case was sanctioned by the Probate Court. Mr. Loucks was retained pursuant to a petition presented by the executrix. The court did not accede to the prayer of the petition that she be allowed expenses. That court could thereafter, in the exercise of a reasonable discretion, allow expenses. Failure to enter the order at the time requested did not in any way restrict the right of the court to subsequently order that the







expenses be paid. In Crowe v. Morrison, 147 Ill. App. 107, the court in affirming an order reducing attorneys' fees and other expenses, said (109):

"For his own protection, and because it is usual and proper practice contemplated by the statute, the administrator should first submit to the Probate Court the propriety of unusual expense to be incurred in litigation, especially when, as it seems in this case, the outcome is doubtful. In that way his duty in the premises and the limit of expenditures may be defined in advance. His acts and expenses incurred, pursuant of a court order, may not be challenged on final accounting. If he chooses to act otherwise, relying upon his own judgment, he may not complain when it comes to final report, if the court should then find, as it would have found, on application for advance authority, that the facts presented did not justify the litigation and expense proposed. Imprudently and unnecessarily he assumed the risk and personal responsibility for the expense, unless it was his purpose and intention to litigate at his own expense should the court refuse to allow his charge against the estate."

Applying the views expressed in the Crowe case to the facts of the instant case it may be said that the executrix (and subsequently the administrator de bonis non) assumed the risk of personal responsibility for the expense, unless it was the intention to litigate at their own expense should the court refuse to allow the charges against the estate. In the case at bar the court did allow the charges in the order appealed from. We are satisfied from the history of the litigation that the court did not abuse its discretion in so doing.

Appellants maintain that there was no showing made that any of the items of expense were ordered or authorized by the executrix. A reading of the petition and answer of appellants does not show that there was any issue as to the items of expense having been ordered or authorized by the executrix. Appellants assert that it was Florence May Jackson's law suit; that it could not have been begun for the benefit of the estate; that the amount of any recovery would







constitute assets of the estate; that upon the death of Florence May Jackson the entire principal of the estate, with any accrued income, was to go to Arthur S. Jackson, who was charged with fraud and from whom the suit seeks recovery; that if he were dead it was to go to his heirs; that no benefit is apparent to Arthur S. Jackson or his heirs from the action sought against Arthur S. Jackson and continued after his death; that the only person for whose benefit the suit was begun was Florence May Jackson; that if there was a recovery and funds collected and put into the trust, the income therefrom would go to her while she lived; that the suit could hardly have been begun and maintained even for her financial benefit; and that the case is a perfect example of vexatious litigation. To comment on this point would require a decision as to whether the litigation should have been begun or whether it should continue. We do not feel that we are called upon to pass on that question in this appeal.

Appellants maintain that with respect to the subject matter of the claim there was no privity of contract or in law between petitioner and the estate; that while the present Probate Court Act provides for the payment of reasonable fees to the attorney for the estate and perhaps permits the filing of a petition for his attorney's fees, they do not find any statutory authority for the filing of the petition. We cannot find that this point was urged in the trial court. It makes no practical difference so far as appellants are concerned whether the administrator de bonis non obtains leave of court to reimburse Mr. Loucks, taking credit for the payment, or the court orders him paid directly.







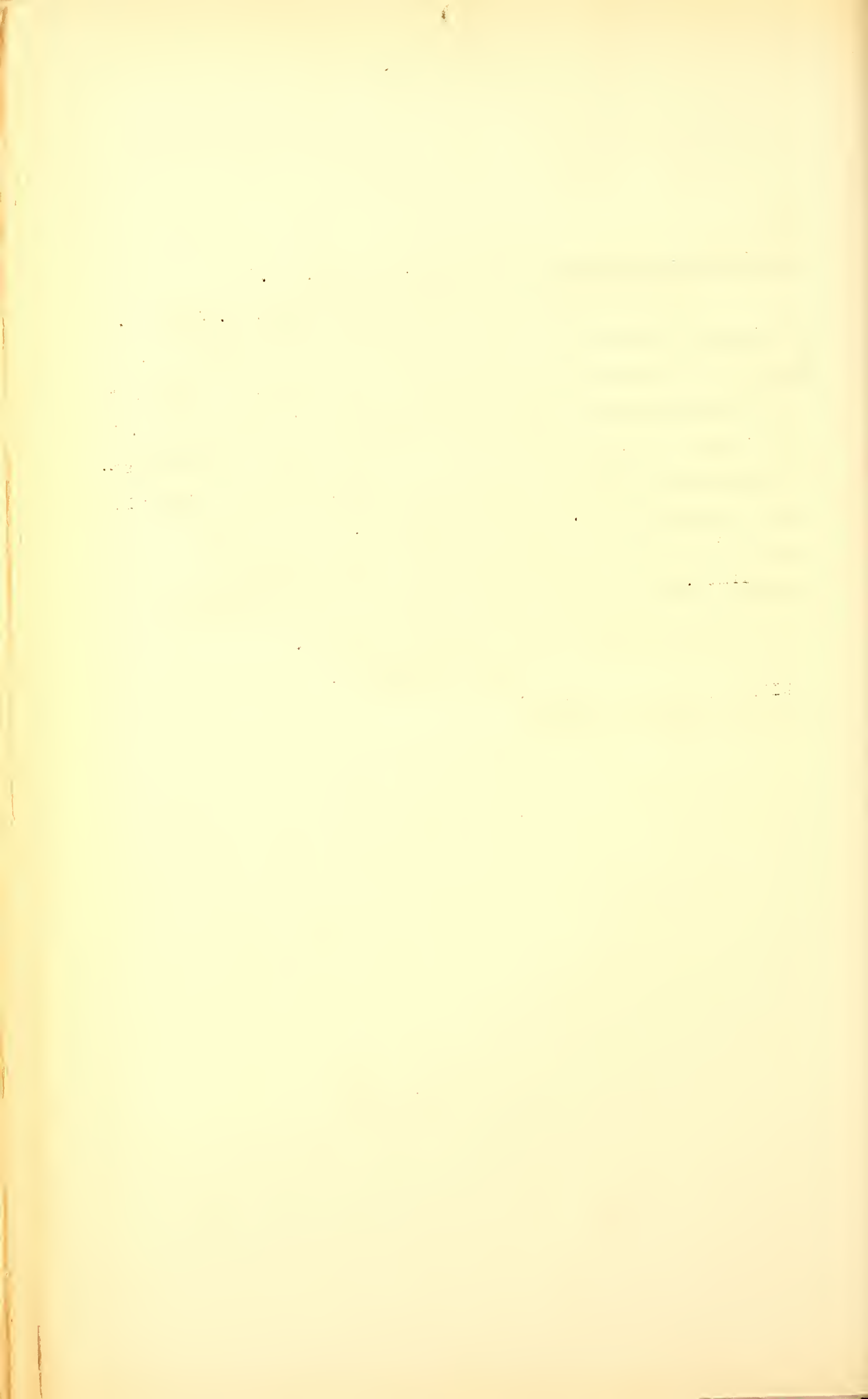
In re Estate of Gilbert, 319 Ill. App. 15, 20.

From the record we cannot say that Mrs. Jackson, as executrix, did not prosecute the action in the Circuit Court in the interest of the estate. That action is against all of the surviving partners and judgment is sought against all of them or their estates. The fact that she, if successful, during her lifetime or her estate after her death would benefit personally, is not controlling. For the reasons stated the order of the Circuit Court of Cook County is affirmed. Nothing said in this opinion is to be construed as passing on any phase of the chancery case.

ORDER AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.







44403

WILLIAM B. HALL,

Appellee,

v.

CARRIE SHINADLE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

336 I.A. 155

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 15, 1947, William B. Hall filed a verified statement of claim in the Municipal Court of Chicago alleging that on or about January 29, 1947 he was a licensed real estate broker; that defendant, Carrie Shinadle, owned real estate improved with a three story building at 4150 South Berkeley Avenue, Chicago; that she listed the property with him for sale at a price of \$10,000; that she verbally requested him to secure a purchaser therefor; that in consideration thereof she agreed to pay him a commission of 5% of the purchase price; that pursuant to the oral agreement he expended money and effort; that he procured a purchaser, who "at all times herein mentioned" was ready, willing and able to purchase the property from defendant upon her terms; that thereafter defendant refused to consummate the deal, stating she no longer desired to sell; that he fully performed all he was required to do in accordance with the terms of the contract of employment; and that he demanded his commission amounting to \$500, which she wrongfully refused to pay. He alleged, in the alternative, that as a result of defendant's neglect and refusal to consummate the deal, he was damaged in the amount of \$500, the fair and reasonable value of the services. He asked judgment for \$500.

In a verified "Defence" filed September 20, 1947, defendant admitted that plaintiff was a licensed real estate



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*Journal of Management Studies*, 19(1), 67-80.

*Journal of Management Education* 30(6)p. 789-804  
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• *Staphylococcus aureus* (Staph aureus) is the most common cause of skin infections.



broker, and that she was and remained the owner of the real estate. She denied that she listed her property with him for sale at a price of \$10,000; denied that she agreed to pay him a commission of 5% of the purchase price; denied that plaintiff procured a purchaser who "at all times herein mentioned" was ready, willing and able to purchase upon her terms; and asserted that plaintiff brought a group of buyers to her home, "but that the most said group together could scrape up was a down payment of \$3400.00, which sum was not acceptable to her." She denied that thereafter she refused to consummate the deal, stating she no longer desired to sell and asserted that she was still ready and willing to sign a contract for a warranty deed provided the down payment was at least \$4,000. She denied that plaintiff fully performed all the acts required to be done by him according to the terms of the contract of employment; denied that a commission of \$500 became payable from her to plaintiff; asserted that he had "never produced a buyer"; and denied that as a result of her neglect and refusal to consummate the deal he had been damaged.

On October 31, 1947 plaintiff moved that judgment be entered on the pleadings. The affidavit in support of the motion states that he has personal knowledge of the facts; that in answer to his sworn statement of claim she filed her "Defence" in which she denied that she stated that she no longer desired to sell; that she further states as a fact in paragraph 6 of her "Defence" that "she is still ready and willing to sign a contract for warranty deed providing the down payment to her is at least \$4,000"; and that on October 17, 1947 his attorney informed her by mail that he, plaintiff, had a purchaser ready, willing and able to make the down pay-







ment required by paragraph 6 of her "Defence" and to enter into a binding contract for the purchase of the property. Plaintiff, in his affidavit, further stated that the available purchaser, Felix Talison, is the same person mentioned in his statement of claim; that Talison is and at all times has been ready, willing and able to purchase on defendant's terms; that "by reason of the foregoing, defendant, having stated she would perform provided the down payment to her is at least \$4000.00, and affiant's original purchaser now being, as always, as indicated hereinabove, ready, willing and able to so perform on his part, affiant prays that he be given judgment on the pleadings in the amount of \$500.00, plus interest at the rate of 6% per annum from 7/31/47 to the date hereof, amounting to \$7.50, plus costs and reasonable attorneys fees."

In a verified answer to plaintiff's motion she re-asserts all statements contained in her "Defence", denies that plaintiff "ever" brought her a purchaser who was able to comply with her terms of sale as given to him, admits that in her "Defence" she stated she was ready and willing to sign a contract provided the down payment is at least \$4,000; admits she further stated in her "Defence" that the buyer brought to her by plaintiff could not pay more than \$3,400 as a down payment, admits she received a letter from plaintiff's attorney stating that plaintiff had a client "now ready to make said down payment"; asserts that this was the first time plaintiff told her he had a client ready to make a \$4,000 down payment; asserts that no tender of any money was made to her; denies that plaintiff is entitled to judgment







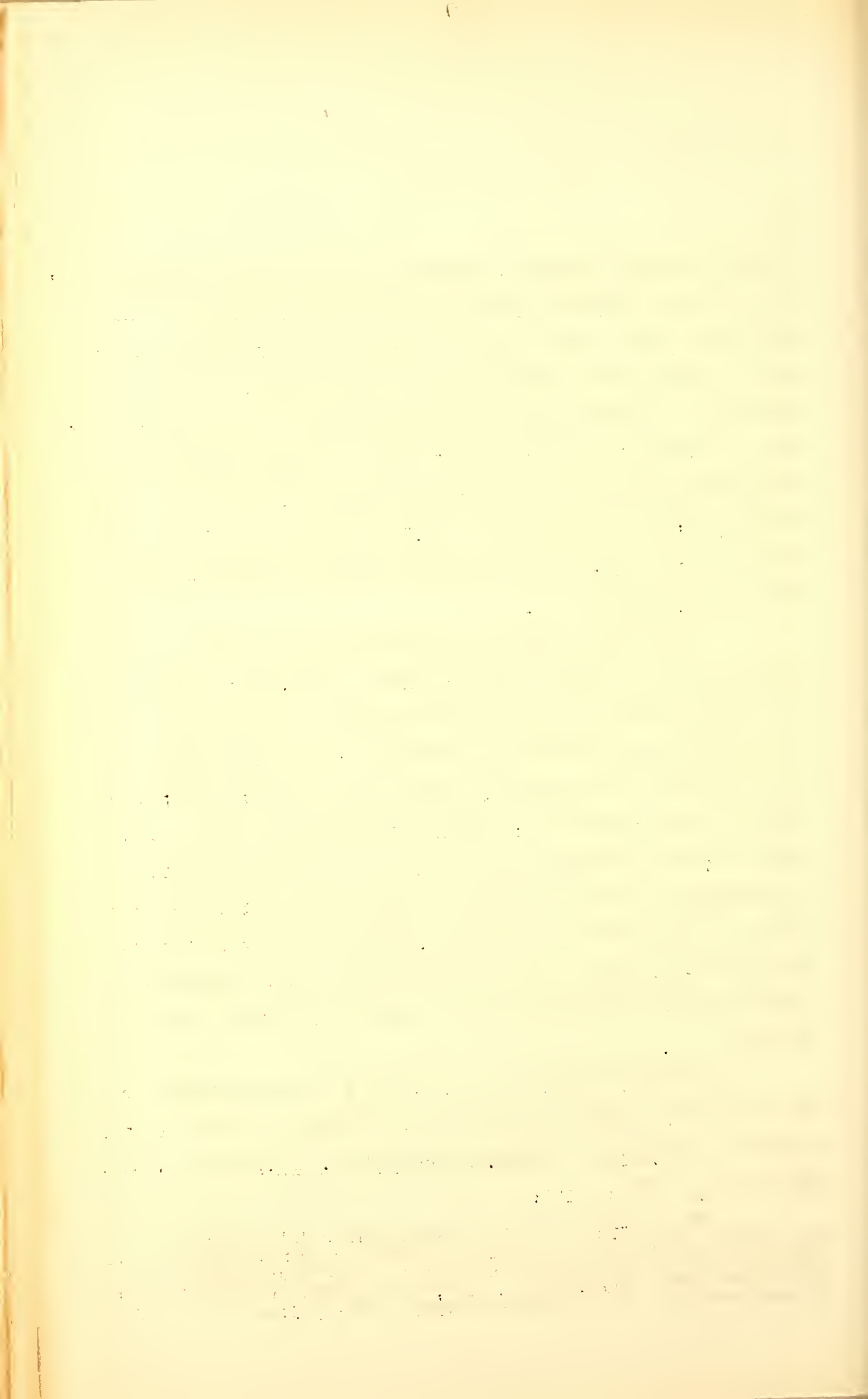
on the pleadings "for the reason that nowhere in her 'defence' does she admit plaintiff performed the acts he stated he performed, and in fact denies that plaintiff did produce a buyer and that said 'defence' raises certain issues of fact which must be decided upon a trial of the case on the statement of claim and 'defence' and not upon any letter attempting to comply after the institution of the suit and after her 'defence' has been filed." The court sustained plaintiff's motion for and entered judgment against defendant for \$500. She appeals.

Plaintiff's theory of the case is that on the record there is no issue worthy of trial. Defendant states that summary judgment was improperly granted because there were controverted questions of fact; that she denied plaintiff furnished a buyer, denied anyone met her terms; denied tender of any money; and that "the case should have been tried on facts existing at the time suit was filed instead of attempting to meet her defence of always being ready to sell at a down payment of \$4,000 by writing a letter after the case was at issue calling upon defendant to go through with the sale by saying they have a buyer who will pay the amount."

Plaintiff states, and we agree, that in a proceeding for summary judgment the whole record should be considered. In Roberts v. Sauerman Bros. Inc., 300 Ill. App. 213, we said (217):

"The fact that the pleadings joined issue does not prevent the entry of a summary judgment. The pleadings should be considered in order that the court may know what the issues are. Ordinarily, a motion for summary judgment presupposes that the pleadings properly join issue. If







the pleadings do not join issue, the usual practice is to dispose of them on motions to strike or to dismiss. A person may be able to state a good defense in a pleading, and yet when he is required to set up that defense in affidavits according to the requirements of Rule 15 of the Supreme Court, it may become apparent that he has no defense. If he has no defense, he is not entitled to a trial. The duty often devolves on the court during a trial to direct a verdict. Then the court decides that there is no issue of fact for the jury to pass on. Likewise, on a motion for summary judgment, when there is no triable issue of fact, the court is bound to enter judgment accordingly. Where the affidavits of merit raise an issue of fact, the motion for summary judgment must be denied. To try an issue of fact by affidavits would deprive a litigant of his right to a jury trial."

Pleadings will be construed most strongly against the pleader.

Whether there are issues of fact is determined from the pleadings and the affidavits and documents filed under Supreme

Court Rule 15. Plaintiff was required to prove that he produced a buyer who was ready, able and willing to purchase on the terms on which the property was submitted by defendant.

She denied that he produced such a purchaser. In his statement of claim he asserted that the property was listed at a price of \$10,000. He did not set out any other terms. She asserted that he brought a group of prospective purchasers, but that the most they could pay was \$3,400 down, which was unsatisfactory to her. She stated that she was willing to sign a contract for a warranty deed providing the down payment to her was at least \$4,000. In his affidavit in support of the motion for summary judgment plaintiff stated that his attorney sent defendant a letter that he had a purchaser, ready, willing and able to make the down payment of \$4,000 and to enter into a binding contract, and that the purchaser, Felix Talison, is the same person mentioned in his statement of claim.

Plaintiff's cause of action, if any, existed at the time he filed his statement of claim. Defendant joined issue







as to certain allegations of the statement of claim. If, on a trial, plaintiff proved that he produced a purchaser who was ready, able and willing to purchase on the terms submitted and that defendant refused to sell, he would be entitled to recover. The "Defence" raised a triable issue of fact as to whether plaintiff procured a purchaser who was ready, able and willing to purchase on the terms submitted by her. There was a factual issue as to whether the proposed purchaser offered a down payment of \$3,400 or \$4,000 on the purchase price of \$10,000. The statement by defendant that "she is still ready and willing to sign a contract for warranty deed provided the down payment to her is at least \$4,000," is entirely consistent with her assertion that the proposed buyers could make a down payment of only \$3,400, which was unacceptable to her. The triable issue joined by the pleadings was not removed by the affidavits subsequently filed. These affidavits make it clear that defendant insists that plaintiff did not procure a purchaser who was ready, able and willing to make a down payment of \$4,000. This payment was, under her contention, an essential part of the terms of the listing. In our opinion the pleadings presented a triable issue of fact which was not overcome by the additional affidavits filed under the motion for summary judgment. The court should not have entered a summary judgment for plaintiff. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.







44476

MAMIE BIGGOTT and JOHN BIGGOTT,

Appellees,

v.

LILLIAN WADAS and LE ROY MRUGACZ,

Appellants.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

336 I.A. 155

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action (Chap. 57, Ill. Rev. Stats.) to gain possession of premises, used as a tavern, in Chicago. Judgment was entered separately against each defendant. They have appealed. No brief has been filed in this court by plaintiffs.

Suit was commenced January 15, 1948. Defendant Lillian Wadas was served with summons, but Mrugacz was not found. Lillian Wadas appeared pro se and the case against her was set for January 29th. She was present but plaintiffs were absent when the case was called. The suit was dismissed. The following day on motion of plaintiffs the dismissal order was vacated, the cause reinstated and set for February 6th. She did not appear and was defaulted. Judgment was entered in favor of plaintiffs and against her for possession. Mrugacz was served with an alias summons February 4th. An appearance was filed on February 5th on behalf of both defendants. On February 16th the case against Mrugacz was heard. The court found that he wrongfully withheld possession from plaintiffs and entered judgment against him and in plaintiff's favor.

The following day attorneys for defendants made a motion, supported by their affidavit, to set aside the default order and judgment against Lillian Wadas and the judgment against Mrugacz. The motion was denied and defendants claim this was error. The affidavit states that Lillian



...and the

1. *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum.

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

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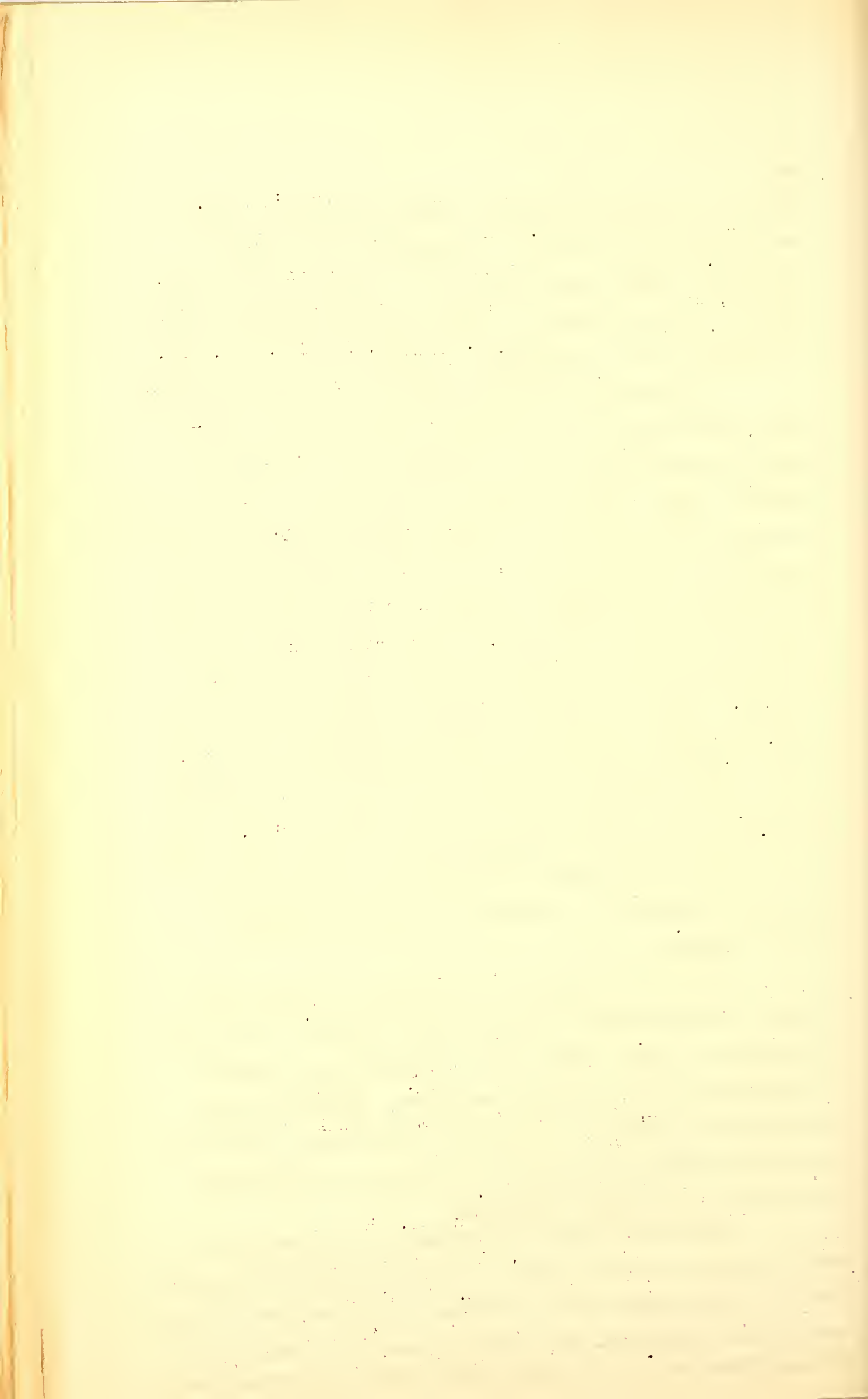
Wadas has a meritorious defense against plaintiff's suit. The defense is not set out. The statement was merely a conclusion. There was no showing of a defense and the court, therefore, did not abuse its discretion in denying the motion as to Lillian Wadas. Kloepper v. Osborne, 177 Ill. App. 384.

The affidavit avers as ground for vacating the judgment against Mrugacz that the court had not "proper jurisdiction" over Mrugacz "and the subject-matter pertaining thereto." This averment rests on the claim that the defendants were sued jointly and that the Forcible Detainer Act makes no provision for dismissing as to, or entering judgment against, the defendants severally. We think the court did not err in entering the separate judgments. The court had the power under Rule 75 of the Municipal Court to enter the judgments severally. When the suit was dismissed Mrugacz had not been served. Neither had he been served when the cause was reinstated. As to him the case stands as though it had not been dismissed. He appeared and was present at the hearing. There was no merit in the ground averred and the court did not abuse its discretion in refusing to vacate the judgment against Mrugacz.

We do not approve of the irregular conduct of the hearing February 16th of the case against Mrugacz. No sworn testimony was taken. There was no objection made, however, by defendant, to the irregular procedure. Though no sworn testimony was taken, the "Consolidated Additional" report of proceedings shows uncontradicted statements and admissions sufficient to support the judgment.

The lease was made with Mrugacz. He agreed not to sublet without lessor's consent. He says he admitted Lillian Wadas to "partnership" in the tavern. He did not have the consent of the plaintiffs. The tavern license is in the name of Lillian Wadas alone. The trial court viewed the parties when







-3-

the statements and admissions were made and we do not think the finding, that there was a breach of the covenant against unauthorized subletting, or judgment should be disturbed.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.







44585

JACK FRIEDMAN,

Appellee,

v.

HELMUTH KASE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

336 I.A. 156'

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action. Judgment for plaintiff was entered December 18, 1947. Issuance of a writ of restitution thereon was stayed until April 30, 1948. On April 29th defendant moved to "vacate or satisfy" the judgment. The motion was denied and defendant appeals. On May 28, 1948, plaintiff moved to vacate all orders subsequent to the judgment. The motion was denied. Plaintiff has cross-appealed.

Plaintiff seeks possession of the second flat at 651 West Aldine Avenue, Chicago, Illinois. The judgment order in addition to finding the right of possession in plaintiff and entering judgment for possession, ordered, upon agreement of the parties, the writ of restitution stayed. It also ordered, under agreement of the parties, that defendant pay plaintiff \$50 per month for use and occupancy, and provided that the acceptance of the money was not to be construed as creating the relationship of landlord and tenant. The motion to vacate, or in the alternative to satisfy the judgment, stated that after the judgment was entered a new tenancy was created because plaintiff accepted a check in the amount of \$50.50, dated April 3, 1948 in payment of rent for the period which ended May 3, 1948; that acceptance of the check for the







period after the date to which the writ of restitution was stayed created a tenancy from month to month; and that for that reason the judgment had been satisfied. This petition was presented as one in the nature of a writ of audita querela. The record shows that the writ of restitution issued May 1st. The record does not show what, if anything, was done with the writ.

The defendant contends that the trial court committed error in denying the motion to "vacate or satisfy" the judgment for possession. He claims that the record establishes that plaintiff accepted payment of rent for a period subsequent to the stay of the writ of restitution and thereby gave rise to a new tenancy. In support of the claim he relies upon the statement to that effect in his sworn petition and claims benefit of the statement because no answer was filed. The record does not show whether the petition was answered. The order denying the petition recites that a hearing was had. We presume the court correctly entered the order. The parties appealing have the obligation of showing wherein the trial court erred. There is no report of the proceedings in the record. There is no certificate of the trial court as to what transpired at the hearing. ✓

Defendant states in his brief that, at the suggestion of the trial court, the parties agreed to waive the report of the proceedings and to present the issues as to the law alone with an agreement as to certain facts. The record does not contain any suggestion of the trial court. If the suggestion were made, we presume the court intended that the agreed facts and questions of law would be presented to this court in accordance with the law. The Practice Act (section 85) authorizes the Supreme Court to provide for and regulate by rule the practice of making and certifying agreed cases







to this court. Supreme Court Rule 48 establishes the procedure. That procedure was not followed in this case. The result shows the wisdom of the rule. In the briefs before us the defendant states and plaintiff denies that an agreement was made to waive the report of proceedings or an agreement made as to the facts.

In the absence of a showing to the contrary, we presume that at the hearing upon defendant's verified petition, the court had sufficient before it to warrant denying the prayer. The hearing may have shown for all that appears here, that the alleged payment to plaintiff was for a period previous to the date on which the stay of the writ terminated. Defendant makes no contention that a payment for any period previous to the termination date of the stay of the writ would have affected plaintiff's judgment.

Plaintiff in his cross-appeal states that the appeal is from the order of May 4, 1948 approving the appeal bond, and from the "notice" by the Clerk of the Court to the Bailiff to stay the writ which issued May 1st. There is no showing of error in the order approving the appeal bond and a party cannot appeal from a notice from the Clerk to the Bailiff.

We need not consider the question whether the court had the power to vacate or satisfy the judgment or permanently stay the writ.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.



1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the specific results of the work.

2. The second part of the report deals with the specific results of the work. It is divided into three main sections: the first section deals with the results of the work in the field of agriculture, the second section deals with the results of the work in the field of industry, and the third section deals with the results of the work in the field of commerce.

3. The third part of the report deals with the conclusions of the work. It is divided into two main sections: the first section deals with the conclusions of the work in the field of agriculture, and the second section deals with the conclusions of the work in the field of industry and commerce.

4. The fourth part of the report deals with the recommendations of the work. It is divided into two main sections: the first section deals with the recommendations of the work in the field of agriculture, and the second section deals with the recommendations of the work in the field of industry and commerce.

5. The fifth part of the report deals with the summary of the work. It is divided into two main sections: the first section deals with the summary of the work in the field of agriculture, and the second section deals with the summary of the work in the field of industry and commerce.





APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Appellant.

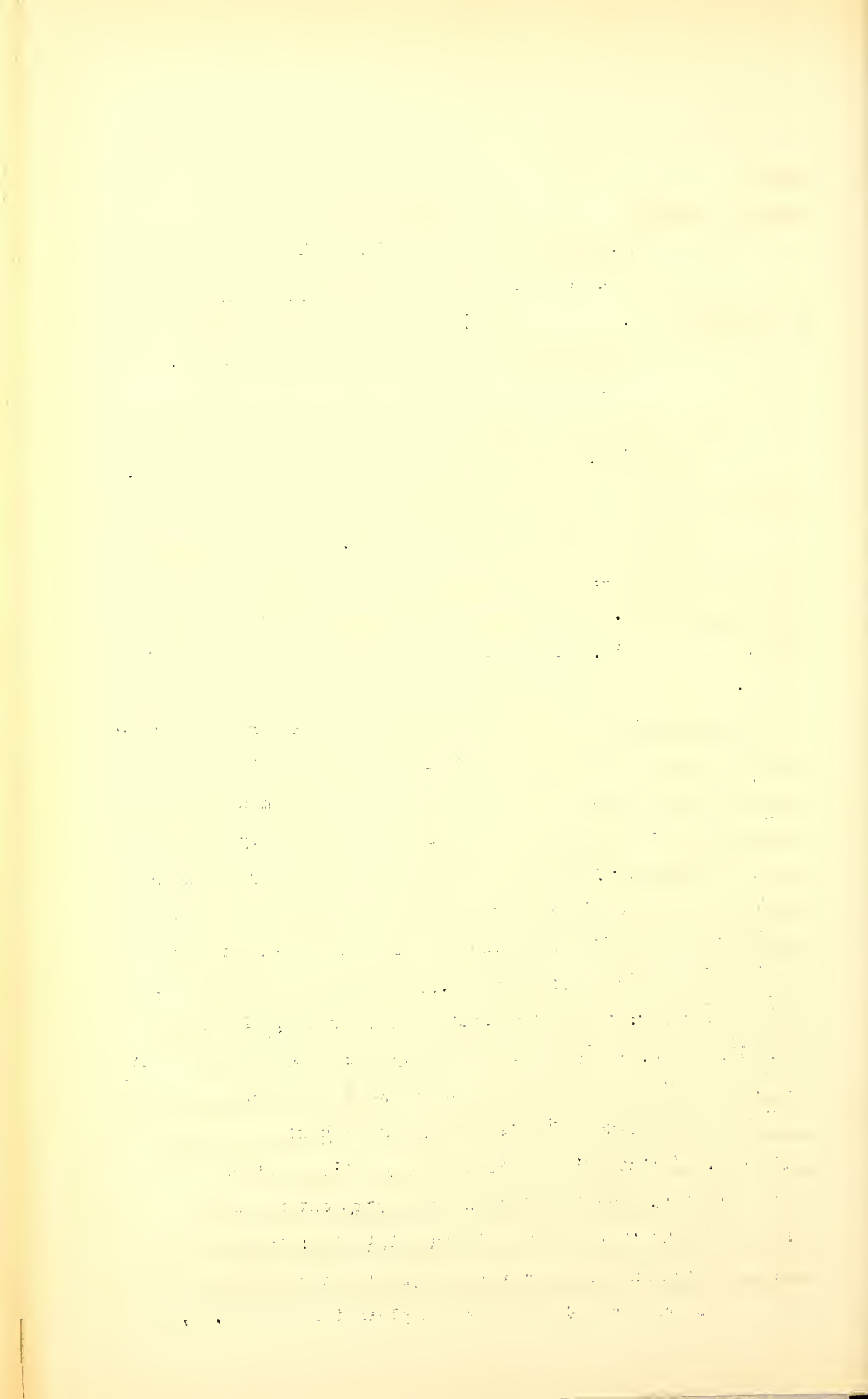
336 I.A. 156

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On September 16, 1947 defendant filed an appearance, a jury demand, and a petition which prayed that leave be given to answer the complaint and that the judgment be vacated on the ground that the action is barred by the statute of limitations. Pursuant to stipulation plaintiff filed an answer to defendant's petition averring in substance that within ten years immediately preceding the filing of the present suit plaintiff paid \$43.18 on account of the notes in controversy; that subsequent to February 26, 1938 and until March 3, 1947 numerous payments were made by defendant or his agent or by third persons on account of the notes pursuant to defendant's directions and with his knowledge and consent. Plaintiff's answer to defendant's petition further avers that the judgment was inadvertently entered for a larger amount than is actually due plaintiff; that after giving defendant credit for all payments actually made on account of said notes there is due plaintiff \$16,803.25,







which includes principal and interest, and, in addition thereto, a reasonable sum to be fixed by the court as attorney's fees.

The record discloses that, after the foregoing pleadings were filed, the court, without a jury, over the objection of defendant's counsel, proceeded to hear testimony bearing on the issues raised by the pleadings. Thereafter on December 10, 1947 the trial court made a finding that the judgment was inadvertently entered for an amount in excess of the actual amount remaining unpaid on the notes in question, plus interest thereon, and thereupon entered judgment for \$16,774.85 and overruled defendant's motion and petition to open the judgment by confession heretofore entered herein on July 21, 1947.

Defendant contends that the trial court erred in refusing to enter an order opening the judgment and directing that the cause be tried on the merits before a jury, as provided in Rule 26 of the Supreme Court.

Prior to adoption of Rule 26, on a motion to open a judgment entered by confession the only questions before the court were whether the defendant had set up a meritorious defense and whether he was diligent in presenting it. (Dunlap v. Gregory, et al., 14 Ill. App. 601.) No question is raised by plaintiff in the present case as to the diligence of the defendant. In his petition defendant alleged in substance that no payment has been made on account of the notes in question nor has he made any new promise to pay them.

The foregoing allegations of defendant's petition show a prima facie defense on the merits to the whole of plaintiff's demands. (Buchanan v. Stephens, 304 Ill. App. 477 .)







Plaintiff's answer to defendant's petition is in the nature of a counteraffidavit going to the merits of the defense and therefore cannot be filed or considered for the purpose of showing there is no merit in the defense urged as a reason for opening the judgment. (Jankovich v. Lajevich, 324 Ill. App. 85; Great Northern Store Fixture Mfg. Co. v. Lamm, 324 Ill. App. 587.)

As we read it Supreme Court Rule 26 does not make any substantial change in the established practice which prevailed before its adoption. (Walrus Mfg. Co. v. Wilcox, 303 Ill. App. 286.)

Plaintiff says there was not a question to submit to the jury because the facts are undisputed. Since we hold that the allegations of defendant's petition to open the judgment show a prima facie defense, defendant's motion should have been allowed in order that the issues of fact raised by defendant's petition could be determined by a jury as provided in Rule 26. If, upon the trial, the evidence discloses that the facts are undisputed, leaving only a question of law, this question can be ruled upon by the court. On the other hand, if it develops on the trial that the facts are controverted, they may be determined by the jury. This it seems to us is a reasonable construction of Rule 26 and conforms to the former practice.

In the view which we take of this case it is unnecessary to consider the other points raised.

For the reasons stated, the order of December 10, 1947 is reversed and the cause remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

BURKE, P.J. AND KILEY, J. CONCUR.







44410

MICHAEL SEKURA,

Appellant,

v.

WILLIAM E. DECKER, Administrator  
of the Estate of Irene Sekura,  
Deceased,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

336 I.A. 157

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order sustaining defendant's motion to strike his complaint in the nature of a bill of review to vacate a decree of divorce. In a former appeal (Decker v. Sekura, No. 43859, 331 Ill. App. 267), involving the same parties and subject-matter, plaintiff sought to reverse an order sustaining plaintiff's (defendant here) motion to strike defendant's petition to vacate the decree here involved. There we held that since the court had jurisdiction of the parties and the subject-matter it was without power to vacate the divorce decree after the term had elapsed.

In the instant proceeding the complaint alleges substantially the same facts as in the former petition; that plaintiff was duly served as a defendant in the divorce case, evidence heard, and a decree entered according to the prayer of the bill; that at the time the plaintiff was served he discussed the matter with his wife Irene Sekura, with whom he was still living, and that she told him that the proceeding had been dismissed; that an ex parte hearing on the complaint was had on November 7, 1945 and a decree of divorce was entered on November 14, 1945, at which time plaintiff and his wife were still living together; that the complaint







for divorce alleged the parties separated on August 10, 1945, when in fact plaintiff was living and cohabiting with Irene Sekura until the entry of the divorce decree.

The fraud alleged in the complaint occurred in the trial after jurisdiction of the defendant had been acquired. In Wood v. First Nat. Bk. of Woodlawn, 383 Ill. 515, at p. 522, the court said: "There are two classes of fraud to be considered in cases of this character, the presence of one of which may be a basis for relief \* \* \*. First, there is that kind of fraud which prevents the court from acquiring jurisdiction or merely gives it colorable jurisdiction; and second, that kind of fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment and other chicanery. The first variety of fraud will invalidate the decree, rendering it an entire nullity. On the other hand, it is well established that the second class has no such legal effect."

In the present case the allegations of the complaint show that defendant was served with summons but offered no defense because his wife had represented to him that she had dismissed the divorce suit, and thereafter continued to live with plaintiff. Thus it appears from these allegations that the only fraud alleged in obtaining a decree was by false evidence.

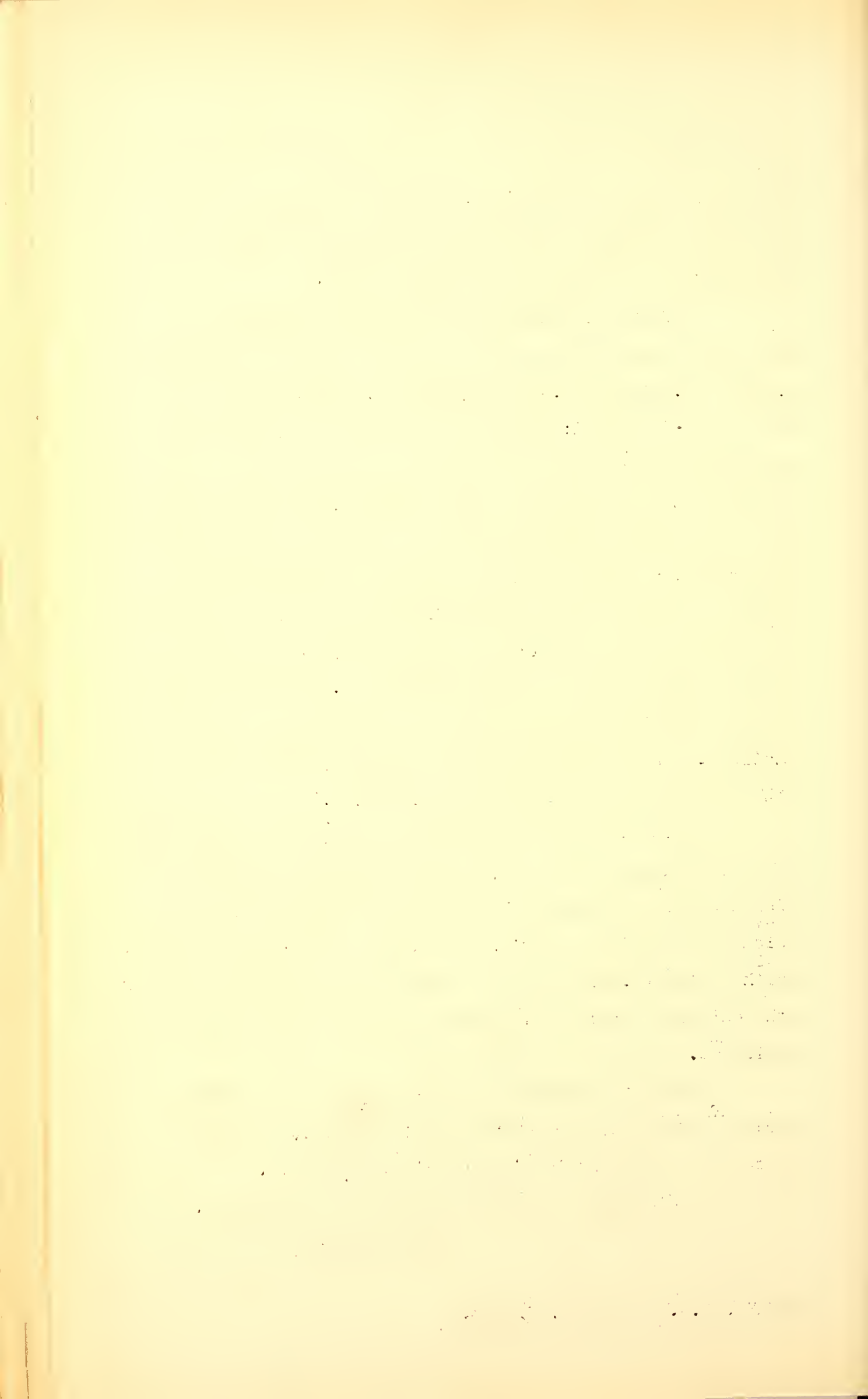
Under the authority of the Woods case, the court properly sustained defendant's motion to strike. To the same effect is Caswell v. Caswell, 120 Ill. 377.

For the reasons given the order is affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.







44459

ELMER O. SLAVIK,

. Appellee,

v.

FOSTER ROTRAMEL,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

336 I.A. 157

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in favor of plaintiff for \$350 entered on the verdict of a jury in an action to recover damages to plaintiff's automobile resulting from a collision with defendant's automobile.

About eleven o'clock in the forenoon on December 2, 1945 defendant was driving his automobile south on Highway 42A, also known as Harlem Avenue, intending to enter the Harlem Airport by means of a private way which is located on the east side of Harlem Avenue about 1300 feet south of the intersection of 89th Street, in Cook County, Illinois. Harlem Avenue is a two-lane highway. Just prior to the collision plaintiff's automobile, driven by his son, was proceeding south several hundred feet behind defendant's automobile. A short distance north of the entrance to the airport plaintiff turned into the northbound lane, intending to pass defendant's automobile. As both cars approached the entrance to the airport defendant made a left turn, causing the right front of plaintiff's automobile to strike the left rear of defendant's automobile near the rear wheel, resulting in the damage complained of.

The allegations of the complaint show that plaintiff's cause of action is based on the theory that defendant







violated Section 162, ch. 95 $\frac{1}{2}$ , Illinois Revised Statutes, 1945, by turning his automobile to the left into the path of the plaintiff's automobile as it was proceeding south in the easterly or northbound lane. In his answer defendant made a general denial. The issues raised by the pleadings were (1) whether or not defendant before making a left turn gave the signal required by statute and, if not, (2) whether his failure to do so was the proximate cause of the injury.

Defendant testified in substance that as he approached the airport entrance he was traveling about twenty miles an hour; that through his rear view mirror he saw plaintiff's automobile about 250 or 300 feet behind him; that when he was about 100 to 125 feet from the airport entrance he rolled down his window and extended his arm, signaling his intention to make a left turn; that just before turning he slowed the speed of his automobile down to eight or ten miles an hour, and that just before making the turn he looked through his rear view mirror but could not see plaintiff's automobile.

Plaintiff's son testified that at the time he turned into the northbound lane he "honked" his horn; that there was no other traffic on the highway; that at the time of the impact he was traveling 40 to 45 miles an hour; that he was about thirty feet behind defendant's automobile when defendant started making a left turn; and that defendant did not "give any kind of a hand or arm signal."

Plaintiff brought this suit as Bailor and, accordingly, the trial court instructed the jury that the question of the exercise of due care and caution on the part of the driver of the automobile at or immediately prior to the accident was not an issue in this case. ✓







The trial court submitted two interrogatories to the jury, reading as follows:

"No. 1. Did the defendant fail to give a hand and arm signal of his intention to turn left during not less than one hundred feet traveled by his car before turning off the highway?

"No. 2. If your answer to Interrogatory No. 1 is yes, did such failure of the defendant to so signal proximately contribute to cause the accident here involved?"

Both of the foregoing interrogatories were answered by the jury in the affirmative.

Defendant contends that the court erred in giving two peremptory instructions which read as follows:

"You are instructed that the Motor Vehicle Act of the State of Illinois provides in part as follows:

"Sec. 56. Overtaking a vehicle on the left. The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions and special rules hereinafter stated:

"(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

"(b) Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal, and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle."

"You are further instructed that if you find from a preponderance of all of the evidence that the plaintiff exercised due care and caution in the selection of Elmer R. Slavik as one authorized to drive plaintiff's car and permitting him to drive said automobile on the occasion herein involved, and that said Elmer R. Slavik was on a mission of his own and was not an agent of plaintiff at the time of the accident herein involved, and if you further find from a preponderance of all of the evidence that the driver of plaintiff's automobile, before attempting to pass defendant did give an audible signal as required by the above section of the Motor Vehicle Act,







and that the defendant did not give way to the right in favor of plaintiff's vehicle, and that such failure to give way to the right in favor of plaintiff's car proximately contributed to cause the accident herein involved, then you should find for the plaintiff and assess his damages."

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"You are instructed that the Motor Vehicle Act of the State of Illinois provides, in part, as follows:

" 'Sec. 65. When signal required. (a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

" '(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by the vehicle before turning.

" '(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

" 'Sec. 66. Signals by hand and arm or signal device. The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle then said signals must be given by such a lamp or device. .

" 'Sec. 67. Method of giving hand and arm signals. All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows:

1. Left turn.--Hand and arm extended horizontally.

2. Right turn.-- Hand and arm extended upward or moved with a sweeping motion from the rear to the front.

3. Stop or decrease speed. --Hand and arm extended downward.'

"You are further instructed that if you find from a preponderance of the evidence that the plaintiff used due care and caution in the selection of Elmer R. Slavik as one authorized to drive plaintiff's car and in permitting him to drive said car on the occasion herein involved, and that said Elmer R. Slavik was on a mission of his own and was not an



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agent of plaintiff at the time of the accident herein involved, and if you further find from a preponderance of the evidence that the defendant did not signal as required by the above sections of the Motor Vehicle Act, and that such failure to signal proximately contributed to cause the accident herein involved, then you should find for the plaintiff and assess his damages."

Defendant contends that his failure to give way to the right as plaintiff's automobile was passing to the left was not of itself negligence nor was the fact that defendant made a left turn without giving an arm signal of itself negligence, but insists that the question was whether such acts "under all the circumstances constituted negligent conduct"; in other words, defendant maintains that the defects of the challenged instructions are misleading because they tell the jury in effect that if the defendant merely violated the statute and that such act contributed to cause the damages complained of the jury was compelled to find the defendant guilty.

In support of his contention that the violation of the statute in the instant case does not constitute negligence defendant cites Hann v. Brooks, 331 Ill. App. 535; Welter v. Bowman Dairy Co., 318 Ill. App. 305; Stivers v. Black & Co., 315 Ill. App. 38; Rasmussen v. Wiley, 312 Ill. App. 404; Burke v. Zwick, 299 Ill. App. 558; and other decisions in the Appellate Court of our State. We shall not attempt to distinguish the cases last cited from the instant case, nor shall we attempt to reconcile the expressions used in them as to the effect of the unexcused violation of the statute designed for the purpose of preventing accidents on public highways. From an analysis of these cases we hold that in Illinois the violation of the statute here involved is prima



1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

$$\frac{dx}{dt} = f(x, y, z), \quad \frac{dy}{dt} = g(x, y, z), \quad \frac{dz}{dt} = h(x, y, z),$$

where  $f, g, h$  are continuous functions of  $x, y, z$  and satisfy certain conditions.

2. In the second part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$ .

3. The third part is devoted to the study of the stability of the solutions of the system of equations.

4. In the fourth part, we consider the case where the functions  $f, g, h$  are periodic in  $t$ .

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

5. The fifth part is devoted to the study of the stability of the solutions of the system of equations.

6. In the sixth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

7. The seventh part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

8. The eighth part is devoted to the study of the stability of the solutions of the system of equations.

9. In the ninth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

10. The tenth part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

11. The eleventh part is devoted to the study of the stability of the solutions of the system of equations.

12. In the twelfth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

13. The thirteenth part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

14. The fourteenth part is devoted to the study of the stability of the solutions of the system of equations.

15. In the fifteenth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

16. The sixteenth part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

17. The seventeenth part is devoted to the study of the stability of the solutions of the system of equations.

18. In the eighteenth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

19. The nineteenth part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

20. The twentieth part is devoted to the study of the stability of the solutions of the system of equations.

21. In the twenty-first part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .

22. The twenty-second part is devoted to the study of the stability of the solutions of the system of equations.

$$\frac{dx}{dt} = f(x, y, z, t), \quad \frac{dy}{dt} = g(x, y, z, t), \quad \frac{dz}{dt} = h(x, y, z, t),$$

where  $f, g, h$  are continuous functions of  $x, y, z, t$  and satisfy certain conditions.

23. The twenty-third part is devoted to the study of the stability of the solutions of the system of equations.

24. In the twenty-fourth part, we consider the case where the functions  $f, g, h$  are linear in  $x, y, z$  and periodic in  $t$ .



facie evidence of negligence. The great weight of authority in other jurisdictions seems to hold that it is negligence, and that the court must so direct the jury. (See Prosser on Torts, p. 274, and cases there cited.)

Since the issue submitted to the jury under the pleadings in the case at bar was narrowed to the single question whether defendant gave the required statutory signal before turning to the left there were no other circumstances for the jury to consider. Therefore, the absence of the phrase "under all the circumstances," or that in substance, did not in our view render these instructions objectionable.

Criticism is also leveled at both instructions on the ground that they failed to instruct the jury that negligence of defendant must be the proximate cause of the injury. Defendant urges that the phrase "proximately contributed to cause the accident," used in the instructions might have led the jury to believe defendant liable if his act merely "contributed" to the collision. Defendant's position is untenable. The phraseology objected to is equivalent in law to proximate cause, and our courts have used these terms interchangeably. (Athens Mining Co. v. Carnduff, 221 Ill. 354; Penwitt v. City of Chicago, 315 Ill. App. 444.)

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.







44507

HELEN SCHMIDT,

. Appellant,

v.

FRED LANGER and ROSE LANGER,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

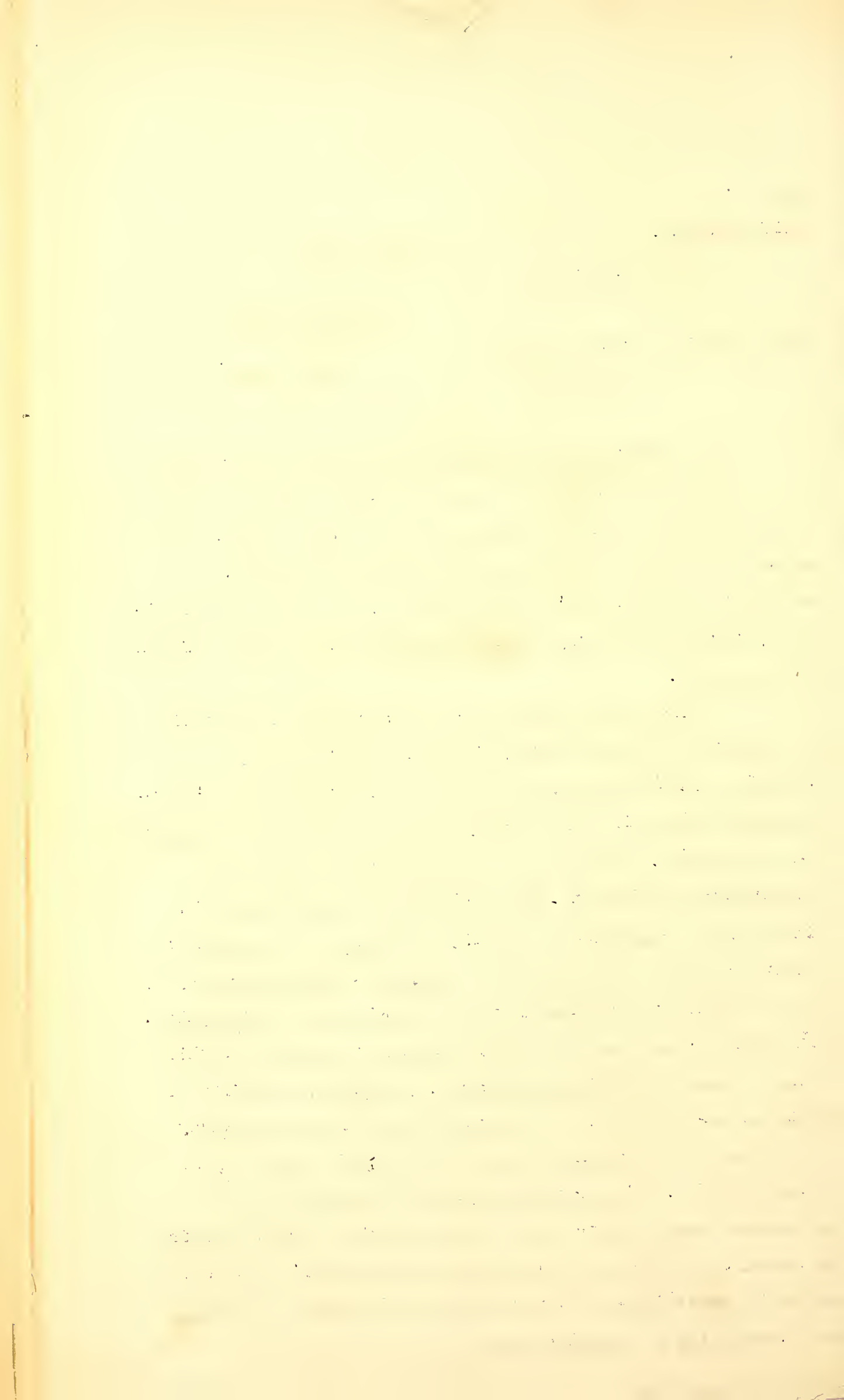
336 I.A. 158

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages alleged to have been sustained by plaintiff when she fell down a flight of stairs at the rear of defendants' apartment building. At the close of plaintiff's case the court, on motion of defendants, directed the jury to find defendants not guilty. Plaintiff appeals.

The material facts are uncontroverted. Plaintiff is a sister of defendant Rose Langer. About 7 p.m. on February 2, 1945 plaintiff's husband went to defendants' two-apartment building at their request for the purpose of repairing the boiler. On the day of the occurrence plaintiff accompanied her husband. She walked to a concrete areaway in the rear of defendants' premises, intending to descend a stairway leading to the basement entrance. The first step of the stairway is triangular and the others are rectangular. The night was cold and the streets were icy and snowy, this being a general condition prevailing throughout the City of Chicago. At the time of the accident the concrete areaway was covered with patches of snow and ice; the stairway was clear and dry. The area where plaintiff walked was not illuminated except for a faint light which was reflected from the snow. At the top of the stairway plaintiff's foot slipped and as a result she lost her balance and fell down the stairway, sustaining a fractured wrist.







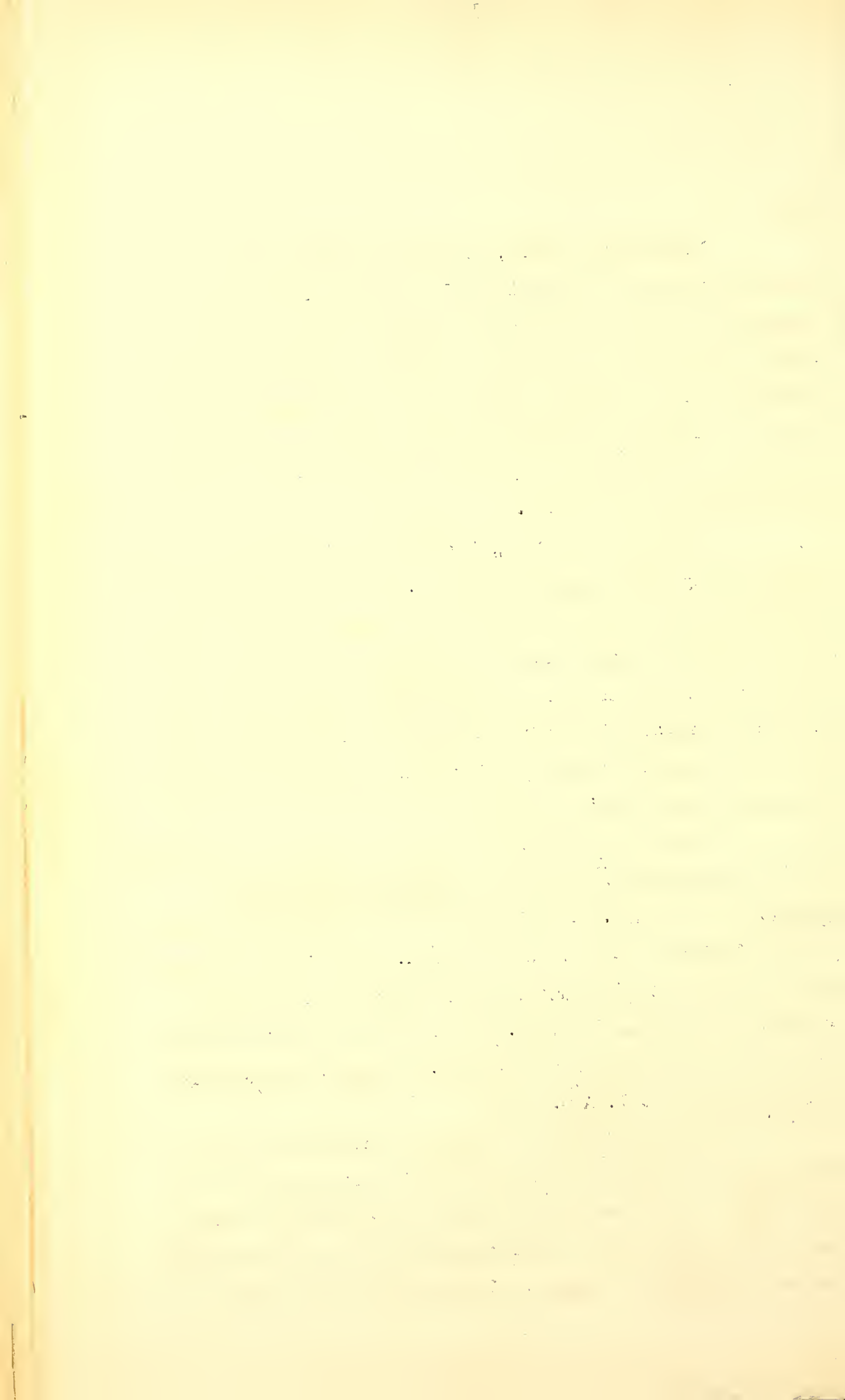
Plaintiff's theory, as stated in her brief, is that she was an invitee upon defendants' premises; that she had been requested to come and bring her husband for the sole purpose of fixing the boiler in defendants' building; and that the combination of the irregular, deformed and dangerously constructed step, the unlighted condition of the premises, and the icy spots on the sidewalk presented a question of fact of defendants negligence for the jury.

Plaintiff testified, "Even before I got down on any step at all my foot slipped on the ice." Her husband said there was snow in spots and that it was packed solid in places on the concrete areaway above and around the steps but that there was no ice or snow on the stairway. Several times before the occurrence plaintiff had walked in the daytime over this same route and down the stairway in question into the basement of defendants' building.

There is no evidence tending to prove that the stairway was dangerously constructed. (Marshall Field & Co. v. LeBosky, 133 Ill. App. 316.) Nor that the construction thereof was the proximate cause of the accident. Plaintiff's injuries were caused by slipping on the ice and snow on the concrete areaway, a condition for which, so far as the evidence shows, defendants were in no way responsible. (Carr v. Lee J. Behl Hotel Corp., 321 Ill. App. 432.)

On other occasions plaintiff's husband had fixed the boiler in defendants' premises, and he alone knew of its operation. Plaintiff did not assist her husband; she merely came for a social visit with defendant, and as a social guest she was a licensee. (Biggs v. Bear, 320 Ill. App. 597.)







Since the evidence is uncontroverted as to the proximate cause of the injury and the surrounding circumstances, there was no question of fact to present to the jury. We think the court was warranted under the authorities heretofore cited in directing a verdict in favor of defendants.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.







44544

PAUL P. FRIEDMAN,  
Appellee,

v.

DAVE BEYERS, doing business as  
D. & A. AUTO SALES,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

336 I.A. 233

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION  
OF THE COURT.

Defendant appeals from a judgment in favor of plaintiff, in a forcible detainer action in the Municipal Court of Chicago, tried without a jury. There was a lease between John T. Williams, as lessor, and defendant, as lessee, for a term commencing November 1, 1947, and expiring April 30, 1949. The lease contained the following clause:

"It is further covenanted and agreed \* \* \* that in the event that the Party of the First Part shall desire to sell the property legally described above, \* \* \* said Party of the First Part may, at his option, cancel this agreement and terminate this lease by giving written 30 days' notice of intention to cancel to the Party of the Second Part."

On February 21, 1948, a contract was entered into between Williams and plaintiff for the sale of the premises. The terms of sale were specifically set out in the contract. It provided that upon the complete performance of the contract by plaintiff, Williams would execute a warranty deed conveying said premises to plaintiff. It appears that on February 26, 1948, Williams gave defendant notice of intention to terminate the tenancy and cancel the







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lease, pursuant to the provision already noted.

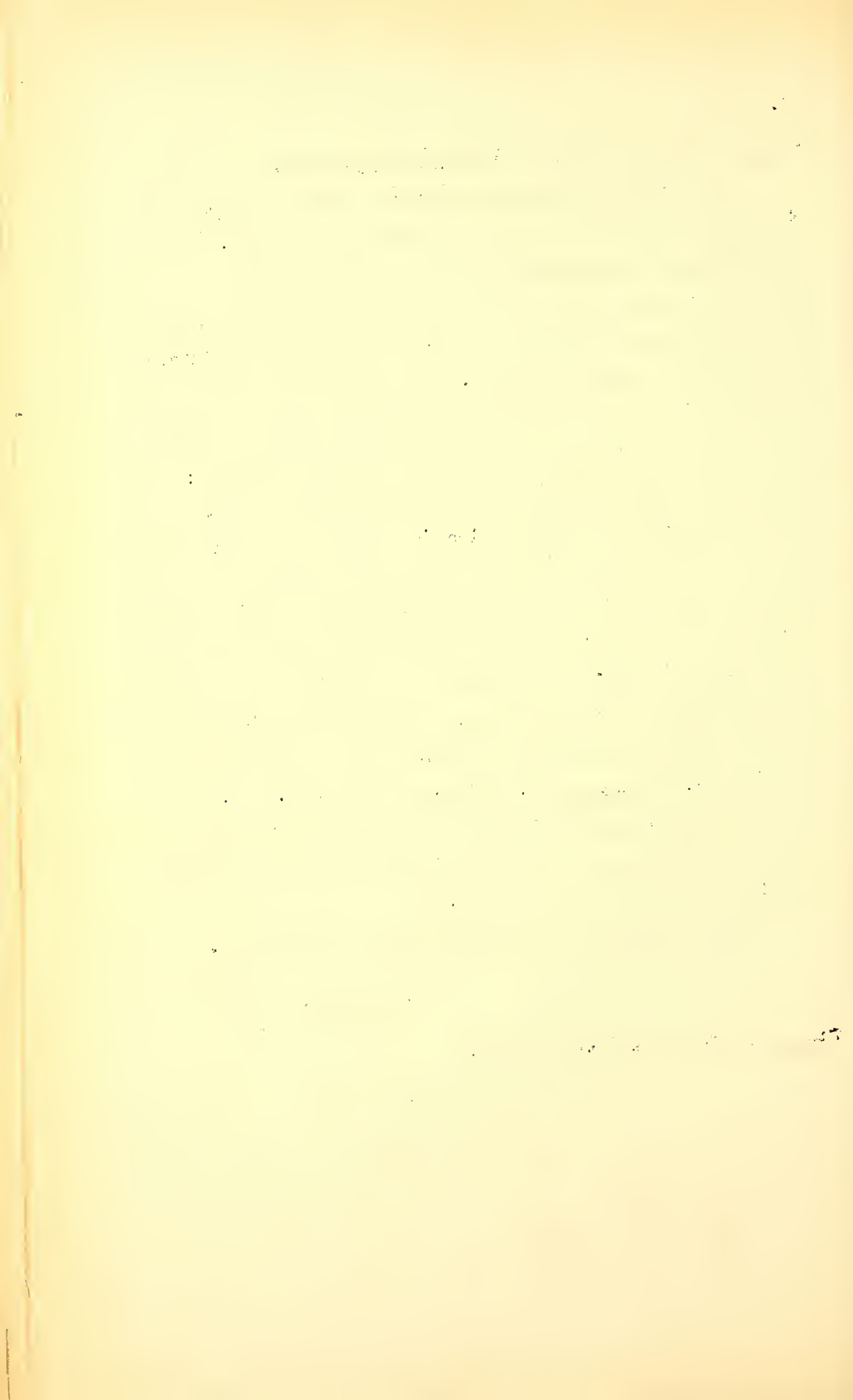
The question raised by defendant rests upon the interpretation of the option to terminate the lease. It is contended by defendant that the contract of sale being executory, plaintiff not having acquired title at the time of the institution of this suit, he could not maintain an action in forcible detainer. We regard this contention without merit. The lessor had reserved the right to cancel the lease in the event he desired to sell the property. The desire to sell must be in good faith and not a mere device employed to cancel the lease. There could be no better evidence of good faith on the part of the lessor in the instant case, when undisputed, than the actual making of a contract of sale, and the payment under the contract by plaintiff, as vendee. The right to exercise the option to cancel, under such circumstances, existed with Williams as the original lessor and, in turn, with the plaintiff as assignee. Bartkowski v. Hoefeld, 226 Ill. App. 198. The mere postponement of delivery of the deed until the complete performance by the vendee does not detract from the bona fides of the contract of sale.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.







44556

JOHN J. GIERASH,  
Appellant,

v.

STANLEY A. BABIARZ,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO

336 I.A. 223

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in his forcible detainer action seeking recovery of possession of premises consisting of a tavern, living quarters and two dance halls because of defendant's alleged failure to secure and pay for plate glass and dram shop insurance, as per the terms of the lease.

The lease provided that the tenant "will pay for the plate glass and dram shop insurance." The notice of termination of the lease was based upon defendant's alleged default in "securing and paying for plate glass and dram shop insurance." Under the terms of a lease substantially the same as that before us, this court in Shank v. Gerrard Wire Tying Machines Co., 250 Ill. App. 346, said: "The provision, then, must be construed as a simple agreement by the tenant to pay whatever fire insurance premiums the landlord might pay 'during the term of this lease' for a certain specified amount of insurance." It appears from the evidence that plaintiff procured plate glass insurance and defendant paid to him the cost of same. Plaintiff, however, failed to procure dram shop insurance. Under the construction which







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must be placed upon the contract, defendant could not be in default until plaintiff had procured and paid for the dram shop insurance.

The judgment is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.







44191

JUANITA ALLISON,  
Appellee,

v.

CHICAGO TRANSIT AUTHORITY,  
a Municipal Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

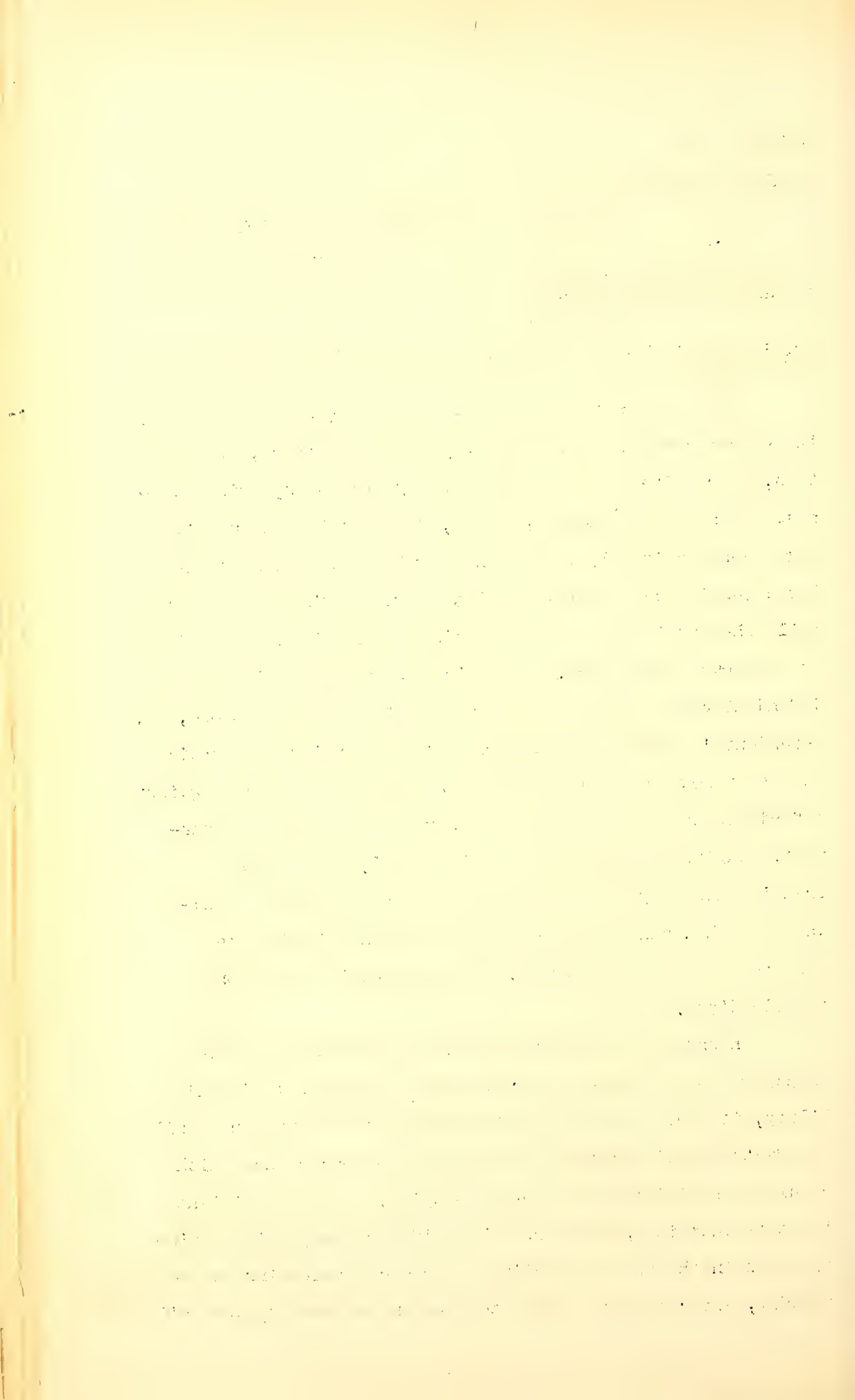
336 I.A. 224

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF  
THE COURT.

This action was brought by plaintiff, Juanita Allison, to recover damages from Thomas J. Friel and others, as trustees or receivers for various railway companies, doing business as the Chicago Surface Lines, for injuries claimed to have been received by her as the result of defendants' alleged negligence in the operation of one of their streetcars, while she was in the act of boarding same. The case was tried by the court and a jury. A verdict was returned finding the defendants guilty and assessing plaintiff's damages at \$14,300. Defendants' motions for judgment notwithstanding the verdict and for a new trial were denied. Judgment was entered against defendants upon the verdict and they appeal from said judgment. During the pendency of this appeal, the Chicago Transit Authority was substituted for the original defendants and that municipal corporation will hereinafter be referred to as the defendant. No question is raised on the pleadings.

Inasmuch as defendant does not question the sufficiency of the evidence to sustain the verdict as to its liability, it would serve no useful purpose to recount in detail the facts and circumstances bearing on the occurrence which resulted in plaintiff's alleged injuries. It is sufficient to state that it appears from the evidence that, while plaintiff was in the act of boarding a streetcar belonging to defendant, after it had stopped to take on passengers, and while





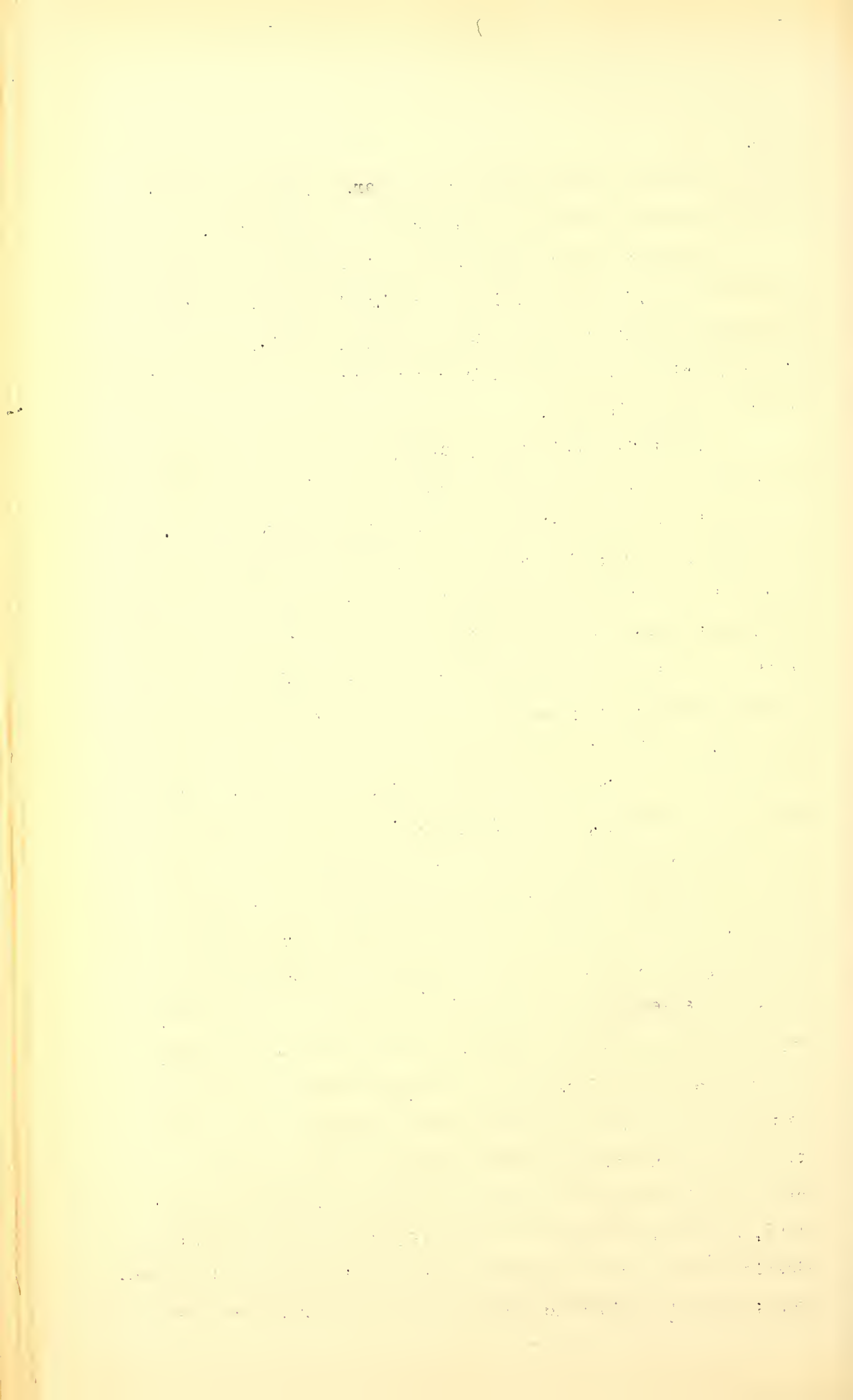


she was standing on the step at the rear entrance of said car, it suddenly started, throwing her to the ground.

Defendant first contends that "the damages awarded are excessive." Since plaintiff claims to have suffered numerous ailments as the result of the accident, we deem it appropriate to set forth in considerable detail the evidence relating thereto.

Plaintiff testified in substance on direct examination that she had never been married and was 39 years old at the time of the accident, which occurred about 4:00 P.M. on April 15, 1945; that as she was dislodged from the streetcar, "she was falling backwards" but turned and landed on her elbow and knee; that after she was assisted to her feet, she felt "something like a shock \*\*\* was coming on" and her knee began to bleed; that she "had an awful banged up feeling in the head" and her head and whole body "was miserable then"; that there were three other ladies with her and after they stood there awhile, she "felt maybe it wasn't \*\*\* serious" and she "would get over it in a few days"; that she and the other ladies then took the next eastbound Lawrence avenue streetcar and rode to an "elevated station" some distance east of Pulaski Road, where the accident happened; that, although she **attempted** to do so, she was unable to walk up the stairs at the elevated station; that she then realized that she was hurt more than she first "thought she was"; that she and the ladies who were with her then returned to the scene of the accident on a westbound streetcar; that she met a police officer there and, after she told him about her accident, he had her conveyed in a patrol wagon to the Belmont Hospital, where she was examined and received first aid treatment; that an antiseptic bandage was placed on her knee and







her back was "taped"; that she was then told at the hospital to go home and call her own doctor; that she and her friends were returned to the elevated station in the patrol wagon; that one of her friends assisted her to walk up the stairs at the elevated station; that she boarded an elevated train and alighted therefrom at 47th street; that she was assisted down the stairs by one of her friends, who went with her to her home at 4634 St. Lawrence avenue in an automobile; that upon her arrival at her home she went to bed and her friend undressed her and called a lady doctor; that she was then "miserable \*\*\* all over" and "was vomiting"; that she had a "headache" and her "back ached"; that Dr. Nunez, the lady doctor, called later that evening and gave her a prescription "to try to stop the vomiting"; that she remained in bed all that night and the next morning, until she received a telephone call from the Belmont Hospital to return there; that her sister accompanied her in a taxi cab to the Belmont Hospital, where she was again examined and "x-rays" taken of her "abdominal back"; that she returned home from the hospital on the same day and went to bed; that on April 19, 1945, four days after the accident, Dr. Hough became her attending physician; that he immediately ordered that she be taken to the Peoples Hospital in an ambulance and that she remained in said hospital for about a week or two and, while she was there, Dr. Hough visited her daily; that he gave her light treatments "to the back and abdomen" and ordered an ice pack for her head and cracked ice to settle her stomach; that after she returned home from the Peoples Hospital in an ambulance, Dr. Hough visited her daily for a while and then weekly until she entered the County Hospital about eleven months after her accident. At this point plaintiff was asked the following







question by her counsel and she made the following answer:  
"Q. What did Dr. Hough do for you? A. Oh, he continued  
taping and strapping my back, and finally I couldn't stand  
that any longer; I was blistered. Then he \*\*\* recommended  
that I should get a surgical garment." She then testified  
that she purchased a surgical belt and had worn same con-  
stantly about her "abdominal back" until the time of the trial,  
which commenced about 22 months after the accident.

Plaintiff further testified that she had never been in-  
jured prior to the date of the accident involved herein; that  
she had lived in Chicago since 1935; that she had studied  
nursing for about two and one-half years in Birmingham,  
Alabama, but was not a graduate nurse; that she had "perfect  
health" before the accident and had never theretofore had a  
surgical operation performed on her; that prior to the acci-  
dent she was employed as a practical nurse receiving an aver-  
age salary of \$45 a week and room and board for twenty-four  
duty; that she worked very little after the accident as a  
practical nurse or in any other capacity; that from the time  
of the accident until the time of her trial her "back is a  
continuous nagging pain \*\*\* at the end of the coccyx bone  
there is untold misery, and at the base of the brain \*\*\* I  
have awful misery at the top of the head \*\*\* just about in  
the middle of the back it's sore to touch, even through  
clothes"; that in addition to the care she received from  
Dr. Hough, she took "neutral baths" and had a number of mas-  
sage treatments; that prior to the accident and since she was  
19 years old she had cramps during her menstruation periods;  
that after the accident she continued to have cramps for  
three days during her menstruation periods; that she entered  
the County Hospital as a patient in March 1946, because she







"was growing steadily worse \*\*\* all my whole body"; that she was treated in the County Hospital for hemorrhoids which she first noticed after the accident; that "they decided it wasn't necessary to operate for hemorrhoids, that it was other things causing it"; that she left the County Hospital on April 7, 1946 and went back there again on April 18, 1946; that while she was there the second time, an abdominal operation was performed on her for the removal of her uterus; that Dr. Hough continued to be her doctor after she left the County Hospital in May 1946; that she went to the Mayo Clinic about September 1, 1946 at the suggestion of Dr. Beguesse; and that she went through the Mayo Clinic for a week or two and paid \$100 for so doing.

There is nothing in the record to show what diagnosis, if any, was made at the Mayo Clinic as to plaintiff's physical or mental condition or what treatment, if any, she received.

Plaintiff then testified that before the accident she did what cleaning and housework were necessary in her small apartment but after the accident her friends did the housework and later she had to employ someone; that prior to the accident she could walk or run "without any discomfort"; that she had participated in many church activities prior to the accident but had taken no part in such activities since the accident; that when she was a child it had to be quiet or she would "lose her food" at mealtime and that since the accident she was unable at times "to hold her food"; that she weighed 151 pounds before the accident, about 110 pounds when she was at the Mayo Clinic and 126 pounds at the time of the trial; and that when she was able to retain her food she gained weight rapidly but when she



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was unable to retain her food she lost weight "just as fast."

At the conclusion of plaintiff's foregoing testimony on direct examination Dr. Charles S. Hough was called as a witness on her behalf.

Dr. Hough testified that he was a licensed physician, having been admitted to practice in this state in 1928; that he had taken a postgraduate course in surgery at the Harlem Hospital in the City of New York and that he was connected with Provident Hospital and Peoples Hospital in Chicago; that he first attended plaintiff on April 19, 1945 at her home and that she was in bed when he examined her; that "she was in partial shock \*\*\* she was very nauseated and at times vomited \*\*\* she was very tender in the attempt to touch her - palpate her"; that he "noticed that she had received first aid somewhere and that there were bandages on the leg, on the elbow and knee, and back"; that he removed the antiseptic bandages and "saw abrasions \*\*\* a little skin broken"; that the abrasions were healing without any infection; that there was a circular bandage all around the entire body from the lower portion of the back -- the sacrolumbar region; that upon removing this bandage "there were bruises just above the middle of the lower spine \*\*\* there was evidence of spasticity", which is "a sort of contraction of a muscle"; that such contraction is "involuntary"; that "nature has spasticity in order to try to mobilize - to put that part at rest"; that plaintiff complained of "extreme tenderness over the front and back, low down, more specifically over the bladder region and over the uterus and the small part of the back - the lumbar region"; that the first thing he did was to give her sedatives to try and quiet her down and then had her taken to the Peoples Hospital in an ambulance; that when she arrived







at the hospital, "she was put to bed \*\*\* there was an ice cap put on her head, she was given sedatives, and she was given heat and light treatments both to the back and over the region of the abdomen"; that the effect "of infra-red heat is to stimulate or increase circulation and by increasing circulation to bring about healing of the part involved"; that there were no x-rays<sup>taken</sup>/of plaintiff at Peoples Hospital but he was informed by someone at Belmont Hospital that the x-rays made of her there "were negative \*\*\* no bones broken"; that he immobilized the lower portion of plaintiff's back by "strapping" it with adhesive; that plaintiff was in Peoples Hospital for two or three weeks and while she was there he saw her daily; that he then ordered her to go home by ambulance and to bed; that the first week she was home he saw her two or three times and after that once a week for about two or three months; that during this period all he could do "was to give her sedatives and in the meantime she procured an infra-red lamp at home and she used that on her back"; that he discontinued "taping" her back, because it irritated her skin and he "ordered her to get a sacro-iliac belt," which she did; that such a belt is worn "to immobilize the part affected \*\*\* the joint in the lower back," which "is a more or less immovable joint"; that normally "the muscles and ligaments" keep that joint from "opening up"; that "evidently there had been trauma and a stria \*\*\* the ligaments had been torn, more or less", which necessitated some immobilization of said joint; that there was external evidence of injury to the lower portion of plaintiff's back, because "there was discoloration and abrasion and spasticity" in that region; that after he visited plaintiff at her home for two or three months after she left Peoples Hospital he advised her "to come to his







office", which she sometimes did; that from the time he first attended plaintiff, four days after the accident, he continued to be her attending physician, except when she was **at** the Mayo Clinic and in the County Hospital; that he suggested that she go to the County Hospital "because she continued to have pain in her abdomen and she would have bleeding from the vagina and also from the bladder"; that he saw plaintiff after her uterus had been removed at the County Hospital and continued to treat her thereafter both at home and in his office; that from the time of his initial treatment of plaintiff "up through 1946" he "noticed that she was more nervous, and the pain seemed to increase in the back, and the pain in the front \*\*\* in the abdomen \*\*\* wasn't quite as bad \*\*\* the operation didn't seem to have much effect on the pain she has in the back, and she has continued to have this pain" and he was "not able to say just when that will cease"; that he last saw plaintiff two weeks before the trial, when he "gave her sedatives and \*\*\* some more infra-red lamp treatment"; that at that time "there was still spasticity of the lumbar muscle \*\*\* and also pain in the abdomen \*\*\* she complained also of headache, more or less constant, and she still had tendencies to be nauseated"; that he diagnosed plaintiff's "progressive condition" as "traumatic neurosis" and that the only thing that he knew that could be done "for the spasticity and pain" in her back "is what we have been doing, and that is try to immobilize it \*\*\* for her to wear her belt, to rest, and to receive heat"; that plaintiff gave him a history of her accident the first time he saw her shortly after it occurred and that plaintiff's "present objective and subjective complaints" are "consistent with the history of such accident"; and that the fair, reasonable and customary charge for the services he rendered plaintiff would







be about \$300.

It appears from the testimony of Dr. Hough on cross-examination that after plaintiff returned to her home from the County Hospital she told him that her uterus had to be removed because of fibroid tumors therein and that at the same time her uterus was removed, her Fallopian tubes and ovaries were also removed.

Dr. Hough further testified on cross-examination that when he examined plaintiff's uterus shortly after the accident, he found no evidence of fibroid tumors therein; that sometimes it requires 10 or 15 years for fibroid tumors to develop and sometimes they develop in a much shorter time; that he knew them to "grow within a month, especially after injury"; that fibroid tumors could be caused "by an accident or injury where a person would fall on either back or side"; that fibroid tumors are found in many women who have never borne children but he knew "they can be known to occur after accidents"; that women who have fibroid tumors ordinarily complain of bleeding and they usually "don't have any pain at all unless there's some trauma"; that "chronic salpingitis is inflammation of the Fallopian tubes"; that it ordinarily requires a long time for the condition to become chronic and it is usually caused by streptococcus or gonococcus infection; and that he found a bruise on plaintiff's back "just above the ilium of the spine."

Dr. Hough was asked the following question and made the following answer on redirect examination: "Q. All right. Now, Doctor, considering the history of trauma present and the actual finding of fibroid tumors some eleven months later, with an operation to remove them, is that consistent with the accident and the symptoms that you found progressive? A. I would say







it was very consistent."

He testified on recross-examination that when he examined plaintiff he found no evidence of salpingitis; that "a cystic ovary is a condition where the ovary \*\*\* grows and enlarges itself \*\*\* from pin-point to the size of a coconut" and that a cystic ovary could be caused by trauma; that external or internal hemorrhoids are not caused by trauma and that he never found any that were.

Plaintiff, having been withdrawn as a witness at the close of her direct examination to permit Dr. Hough to testify, was recalled for cross-examination. The substance of her testimony on cross-examination was that she first suffered from hemorrhoids just before she went to the County Hospital; that she did not know that all of her female organs were removed until after she went home from the hospital; that the pains in her abdomen and back were more severe after she left the County Hospital; that during the time she was studying to be a nurse she did not menstruate; that when she was examined at the County Hospital she was alert and co-operative but in distress; that at that time her abdomen was normal "from outward appearance" but she was suffering "intense misery \*\*\* the entire abdominal cavity was sore to touch"; and that she did not know that she was suffering from chronic salpingitis or that she had fibroid tumors in her uterus. Plaintiff was asked the following question and she made the following answer: "Q. What are your aches and pains today? A. Excruciating pain \*\*\* the top of the head \*\*\* the end of the coccyx bone is most miserable."

She further testified, after corroborating Dr. Hough as to the treatment he administered to her, that she received some relief from the heat treatments but that it was only







temporary; that she wore a surgical belt all the time, even when she slept at night; and that the area concerning which she had complained since the time of the accident was where "there was a bruise to the lower right lumbo-sacral region."

Dr. Matthew J. Kiley testified in defendant's behalf in substance that he was an assistant professor of gynecology at Northwestern University, senior attending gynecologist at St. Lukes Hospital and a specialist in women's diseases; that fibroid tumors are very common in colored folks and in women who have not borne children; that perhaps half of the women who are around fifty years of age, who have not had children, have had fibroid tumors; that the cause of this is not exactly known; that there are five theories but it is not known exactly why they come; and that "fibroid tumors are never caused by trauma"; that chronic salpingitis of the Fallopian tubes means chronic infection; that it is usually caused by repeated infections to the Fallopian tubes and in eighty per cent of the patients it is of gonorrheal origin; and that he had "never seen one due to trauma." He then testified in considerable detail concerning various kinds of cystic ovaries and said "I've never heard of any of these caused from trauma."

Defendant urges that "the burden rests upon the plaintiff to prove that each of the ailments sought to be charged to the accident were proximately caused by such accident" and that "damages cannot be awarded upon surmise, conjecture and speculation."

It will be noted that no attempt was made on the direct examination of plaintiff or Dr. Hough, her attending physician, to show that the fibroid tumors in her uterus and the diseased condition of her Fallopian tubes and ovaries







and the consequent removal by operation of said female organs were attributable to the accident.

The only cause shown by the record for the removal of plaintiff's uterus was the growth of fibroid tumors therein. Dr. Hough testified that he did not find any evidence of fibroid tumors in her uterus, when he examined her shortly after the accident, and that considering the history of trauma present and the actual finding of fibroid tumors eleven months later, with an operation to remove them, he "would say" that it was "very consistent" with the accident and the symptoms that he found progressive. He also stated that it usually requires a number of years for fibroid tumors to develop but he knew that they "can be known to occur after accidents." To say the least, his testimony in this regard was extremely speculative and conjectural and it did not fairly and reasonably tend to prove that the fibroid tumors were proximately caused by the accident in question.

It will be recalled that Dr. Hough testified that chronic salpingitis is inflammation of the Fallopian tubes; that in most cases it requires a great deal of time for this inflammation to develop; that it becomes chronic after the condition exists over a long period of time; that salpingitis is usually caused by infections of various types and that it could be caused "by streptococcus or gonococcus"; and that when he examined plaintiff he did not find any evidence of salpingitis. As to the salpingitis, Dr. Hough did not even testify that it could be caused by trauma and obviously that ailment cannot be charged to the accident.

As heretofore shown, Dr. Hough testified that "a cystic ovary is a condition where the ovary \*\*\* grows and enlarges itself \*\*\* from pin-point to the size of a coconut"







and that it could be caused by trauma. His testimony in this regard did not fairly and reasonably tend to prove that there was any causal connection between the accident and that ailment. Therefore, there is no reasonable basis in the evidence upon which to charge the cystic ovaries and the operation for their removal to the accident.

Dr. Hough finally diagnosed plaintiff's "progressive condition" as "traumatic neurosis." After testifying as to such diagnosis, he further testified that plaintiff gave him a history of her accident the first time he saw her after it occurred and that her "present objective and subjective complaints" are "consistent with the history of such accident." According to plaintiff, her only "subjective complaints" at the time of the trial were that she suffered "excruciating pain" on the top of her head and "at the end of her coccyx bone" and that she also suffered pain in "the lower right lumbo-sacral region." While this testimony of the doctor and plaintiff might tend to prove a causal connection between the accident and other ailments she complained of, it certainly did not tend to prove that the fibroid tumors, salpingitis and cystic ovaries were proximately caused by the accident.

There can be no question but that plaintiff suffered some injury as a proximate result of the accident but we are impelled to conclude after a careful examination of all the evidence in the record bearing on the nature and extent of her injuries and ailments that she exaggerated same. Furthermore, a large part of her testimony and that of her doctor was of such a nature that a considerable portion of the damages awarded her could only have been assessed by the jury as a result of conjecture and speculation on its part. Damages which are merely possible are speculative. (8 Thompson on







Negligence, sec. 7195; 6 Thompson on Negligence, sec. 7202; Salaban v. East St. Louis and Interurban Water Co., 284 Ill. App. 358.)

We are mindful of the rule that the question of damages is peculiarly one of fact for the jury but we are also mindful of the rule that where, as here, there is a failure to prove a causal connection between the accident and many of the elements of damage sought to be charged to such accident, no recovery can be had as to said elements of damage.

In our opinion, plaintiff presented no competent evidence which fairly and reasonably tended to prove that the fibroid tumors in her uterus and the diseased condition of her Fallopian tubes and ovaries were proximately caused by the accident in question and she was not entitled to be awarded damages for those ailments, the operation necessitated by them or any incapacity suffered by her as the result of said ailments and operation. Therefore, the damages assessed by the verdict were excessive, at least to the extent of such amount as was awarded her in respect to the foregoing elements of damage. Since there is no way of determining what portion of the damages awarded plaintiff was allowed her because of the fibroid tumors in her uterus and the diseased condition of her Fallopian tubes and ovaries, the verdict cannot be cured by a remittitur. We are impelled to hold that the damages awarded by the verdict were grossly excessive and that the trial court erred in overruling defendant's motion for a new trial. ✓

Defendant's only other contention is that it "was deprived of the statutory right to challenge a juror peremptorily," because such juror made false answers to pertinent questions of counsel on her voir dire examination. It







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would serve no useful purpose to discuss this contention, in view of our holding that defendant is entitled to a new trial because the damages awarded were grossly excessive.

For the reasons stated herein the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.







44283

336 I.A. 224

EVA H. HEUER, Appellant,

v.

PAUL H. DAVIS et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF  
THE COURT.

This is an action at law by the plaintiff, Eva H. Heuer, against Paul H. Davis and others, copartners, doing business as stock and grain brokers under the name of Paul H. Davis & Co., to recover damages from said brokers because of their alleged breach of contract in connection with a short sale of grain they were carrying for her.

The second amended complaint consists of three counts and the third count thereof seeks to recover damages not only from the defendant brokers but also from Joseph C. Hyatt, who was employed by them as a customer's man, Hyatt being charged in said third count with malicious and fraudulent acts which caused said brokers to breach their contract with plaintiff. Motions made by the defendant brokers and Hyatt to dismiss plaintiff's second amended complaint were sustained by the trial court and judgment was entered dismissing the case. Plaintiff appeals. The defendant brokers will sometimes hereinafter be referred to as the defendants and their codefendant, Hyatt, will be referred to by his name.

The first count of plaintiff's second amended complaint alleged that the defendants transacted business as stock and grain brokers in the City of Chicago and were and are members of the Chicago Stock Exchange, the New York Stock Exchange and the Chicago Board of Trade; that on or about December 1, 1945 "plaintiff, as customer, opened a grain account with the defendants Paul H. Davis & Co., as brokers, and the opening of







said grain account constituted in law the making of a contract between the plaintiff and said defendants Paul H. Davis & Co. and by this contract are fixed their reciprocal and mutual rights and duties to each other from which the law implies the usual and customary incidents of the relationship of customer and broker and determines the rights and duties of both parties in accordance therewith"; that at the time she opened said account plaintiff employed Davis & Co. as her agent and broker to buy and sell grain upon her orders and it agreed to carry same upon margin, subject to her directions; that plaintiff deposited with said company various large sums of money, aggregating \$50,000, to protect it from loss in the execution of her orders for the purchase or sale of grain for her account; that some of her orders were given by plaintiff directly to Davis & Co. and some were given to said company by plaintiff indirectly through Bache & Co., stock and grain brokers of Milwaukee, Wisconsin, "acting pretty much in the capacity of messenger boy to transmit said orders," and that "during all the times herein mentioned, the defendants Paul H. Davis & Co. were bound and obligated to carry out the instructions given to them by the plaintiff directly or indirectly through said Bache & Co., of Milwaukee, Wisconsin, for the purchase and sale of grains and in covering short sales"; that the parties sometimes loosely referred to some of said orders transmitted to defendants by Bache & Co. as "give up" orders but they were not "give up" orders as that term is generally understood; that it was an express or implied duty and obligation of defendants under their contract of employment with plaintiff to at all times keep her informed of all facts and circumstances which might make it necessary for her to take steps to protect her interests; that as a part of defendants' con-







tract of employment they were directed and instructed by plaintiff "to clear all her purchases and sales through said Bache & Co. only and not through any other broker" and that defendants in violation of such instructions in said contract did not clear said purchases and sales through Bache & Co. but through James S. Templeton's Sons; that under their contract of employment, the defendants had no right to buy or sell or cover short sales on their own initiative; that they could only do what the plaintiff instructed them to do and in the absence of any orders or instructions from plaintiff "they could do nothing"; that "defendants were at all times bound and obligated to carry out the orders and instructions for the purchase and sale of grain and in covering short sales given to them by the plaintiff directly or indirectly through said Bache & Co."; that the relationship between plaintiff as customer and defendants as brokers being that of principal and agent, could be terminated by the defendants only upon and after reasonable notice; that "the aforesaid contract of employment so made between the plaintiff and said defendants Paul H. Davis & Co., so far as known to the plaintiff, was and is verbal; that the plaintiff has no knowledge or recollection of signing any written instrument which might be construed to be a written contract or the written part of a contract between the plaintiff and said defendants Paul H. Davis & Co.; that if the plaintiff did sign any such written instrument it was prepared by the defendants Paul H. Davis & Co. and said defendants did not give the plaintiff any duplicate original or copy thereof and that if this action is founded in whole or in part upon any written instrument, such written instrument is not in the possession of the plaintiff nor accessible to her but is in the possession







of the defendants Paul H. Davis & Co."; and that plaintiff has complied with all the terms and conditions of said contract of employment so made with the defendants.

The first count further alleged that pursuant to plaintiff's instructions defendants on or about December 5, 1945 sold "short" and were carrying for her 5 M May rye at \$1.6325 per bushel and that on said date and "at all times herein mentioned" plaintiff had on deposit with defendants sufficient funds as margin to protect them "from loss in carrying said grain and short sale, subject to her order for the covering of said short sale"; that the defendants knew that plaintiff "wished to stay and remain short," because she had previously told them so; that at no time did the defendants call upon or demand from plaintiff any additional margin, her short sale being at all times properly margined; that on May 8, 1946 the defendants, without plaintiff's knowledge or consent, and without any authority from or notice to her, wrongfully covered the aforesaid short sale by the purchase of 5 M May rye at \$2.745 per bushel; that thereafter on May 20, 1946 plaintiff, acting through Bache & Co., without knowing that said short sale had been covered by defendants directed the latter to cover the short sale at \$2.30 per bushel, "which they did not do and could not do, because they had disabled themselves as aforesaid from doing"; that May rye sold in the grain market on May 20, 1946 for \$2.30 per bushel, which is the price at which plaintiff ordered the defendants to cover the short sale; that defendants breached their contract of employment with plaintiff in the following, among other particulars: "(a) they cleared the aforesaid purchases and sale through James S. Templeton's Sons in disobedience of the plaintiff's instructions; (b)







they failed and neglected to purchase 5 M May rye on to-wit May 20, 1946, as instructed to do by plaintiff for the purpose of covering said short sale; and (c) they on to wit May 8, 1946, without plaintiff's knowledge or consent, and without any authority from her, and without any notice whatever to her, wrongfully covered the aforesaid short sale by the purchase of 5 M May rye at \$2.745 per bushel"; that the defendants are therefore liable to plaintiff for all losses and damages she thereby sustained and the defendants lost their lien upon the funds, aggregating \$50,000, deposited with them by plaintiff as margin, which she is entitled to recover; that "the aforesaid wrongful purchase of 5 M May rye on to-wit May 8, 1946, made by the defendants Paul H. Davis & Co. at \$2.745 per bushel to cover the short sale as aforesaid amounts in the aggregate to \$13,725.00 whereas said 5 M May rye could have been purchased on to wit May 20, 1946, at \$2.30 per bushel to cover said short sale which amounts in the aggregate to \$11,500.00, the difference between these amounts is \$2225.00 from which should be deducted a broker's commission of \$15.00 leaving \$2210.00 which is the net loss to the plaintiff, which said loss is a direct and proximate result of the defendants Paul H. Davis & Co.'s breach of their aforesaid contract and their wrongfully covering said short sale as aforesaid"; and that, although plaintiff has demanded said sums of \$50,000 and \$2210.00 from defendants, they have refused to pay same.

The second count of plaintiff's second amended complaint incorporated therein by reference all of the allegations of the first count and, in addition thereto, alleged that on May 7, 1946 plaintiff, acting through Bache & Co., "placed an order with the defendants Paul H. Davis & Co. to







buy 5 M May rye the next morning below last night's close and to sell the same at \$2.80 per bushel, and that said order to buy was executed promptly upon the opening of the grain market the next morning at \$2.745 per bushel; that after said purchase had been made said May rye reached in the grain market a price of to-wit \$2.84 per bushel which is above the price at which plaintiff had ordered said 5 M May rye sold and said defendants Paul H. Davis & Co. failed and neglected to sell said 5 M May rye for plaintiff in accordance with her said instructions, although there was a market for the same and said 5 M May rye could have been sold for at least \$2.80 per bushel"; that by reason of defendants' failure to comply with plaintiff's directions to sell at \$2.80 per bushel the 5 M May rye, which they purchased on May 8, 1946 at \$2.745 per bushel pursuant to her order, she suffered a loss of approximately \$260.

This count further alleges that prior to 2 p.m. on May 7, 1946 the defendants were notified by James S. Templeton's Sons that the latter "would accept no more sales or purchases of May rye except such as were necessary to close out pending grain accounts; that the plaintiff did not know that the defendants Paul H. Davis & Co. were clearing through James S. Templeton's Sons in violation of the aforesaid instructions of the plaintiff and did not know that James S. Templeton's Sons would accept no more sales or purchases of May rye except to close out pending grain accounts until the defendants Paul H. Davis & Co. acting by and through their customer's man Joseph C. Hyatt so notified the plaintiff by telephone just a few minutes before the grain market opened on the morning of to-wit May 8, 1946, and that said Joseph C. Hyatt then and there told plaintiff







that he would immediately notify Bache & Co., of Milwaukee; Wisconsin, by long distance telephone call that James S. Templeton's Son's would accept no more sales or purchases of May rye except to close out pending grain accounts and that the plaintiff refrained from then and there telephoning said Bache & Co. herself because to have done so would have taken the wire from said Joseph C. Hyatt and said Joseph C. Hyatt and the defendants Paul H. Davis & Co. wholly failed and neglected to telephone or otherwise notify said Bache & Co. that James S. Templeton's Sons would accept no more sales or purchases of May rye except to close out pending grain accounts, within a reasonable time after said defendants received said information and did not do so immediately after said Joseph C. Hyatt said he would do so as aforesaid; that during all the times herein mentioned, the defendants Paul H. Davis & Co. used the man of Bache & Co. who was on the floor of the Board of Trade in making purchases and sales of grain because Paul H. Davis & Co. had no man of their own on the floor of said Board of Trade and said man on the floor of said Board of Trade was the agent of said defendants Paul H. Davis & Co.; that the plaintiff immediately protested said violations of her instructions and warned the defendants Paul H. Davis & Co. and said Joseph C. Hyatt of the consequences thereof; that it was of the utmost importance that plaintiff and said Bache & Co. receive said information within a reasonable time prior to the opening of the grain market on the morning of to-wit May 8, 1946, so as to cancel said order to buy of to-wit May 7, 1946, as otherwise said order might be wrongfully used to cover said short sale and the plaintiff did not want to cover said short sale at that time or at that price and







said order to buy of to-wit May 7, 1946, was a separate, distinct and independent order and transaction having nothing whatever to do with said short sale; that the defendants Paul H. Davis & Co. and Joseph C. Hyatt at all times herein mentioned well knew that the aforesaid order to buy 5 M May rye below last night's close placed by the plaintiff as aforesaid on to-wit May 7, 1946, was not to be used to cover the aforesaid short sale but was an entirely separate, distinct and independent order and transaction having nothing whatever to do with said short sale because plaintiff had previously told them so and in the absence of being so told, they would have known from the wording of the order itself; that the defendants Paul H. Davis & Co. and Joseph C. Hyatt did not afford the plaintiff any reasonable opportunity to cancel said order to buy of to-wit May 7, 1946; and that said order to buy was promptly executed upon the opening of the grain market on the morning of to-wit May 8, 1946, and said defendants Paul H. Davis & Co. wrongfully used and applied said order to buy, or the purchase made pursuant thereto, to cover said short sale."

This count contains numerous other allegations to the effect that defendants lost their lien on the funds deposited with them as margins by plaintiff by reason of their having cleared her purchases and sales of grain through James S. Templeton's Sons rather than through Bache & Co. contrary to her instructions. The second count concluded with a prayer for judgment against the defendant brokers for \$60,500.

The third count incorporated by reference thereto all of the allegations of counts 1 and 2 and contains the following additional allegations: "That during all the







times herein mentioned the defendant Joseph C. Hyatt was a customer's man for, and the duly authorized agent of, the defendants Paul H. Davis & Co. in and about the handling of the aforesaid grain account of the plaintiff; that at all the times herein mentioned the defendant Joseph C. Hyatt knew the plaintiff was short and wanted to stay and remain short because plaintiff had previously told him so and because as a matter of law said defendant Joseph C. Hyatt had to presume that plaintiff wished to stay short until she advised him to the contrary; that said Joseph C. Hyatt at all times herein mentioned well knew that the aforesaid order to buy 5 M May rye below last night's close placed by the plaintiff as aforesaid on to-wit May 7, 1946, was not to be used to cover the aforesaid short sale but was an entirely separate, distinct and independent transaction having nothing whatever to do with said short sale and he knew this because plaintiff had previously told him so and in the absence of being so told, he would have known from the wording of the order itself; that the usual practice of the defendants Paul H. Davis & Co. was and is to clear their purchases and sales of grain through Bache & Co. but the defendant Joseph C. Hyatt for his own personal gain in hopes of getting some stock brokerage business from James S. Templeton's Sons by sending some grain brokerage business to them cleared all purchases and sales of grain for plaintiff through said James S. Templeton's Sons in violation of the aforesaid instructions of the plaintiff which said instructions were given to the defendants Paul H. Davis & Co. as aforesaid and were also given, prior to the happening of the things herein complained of, to said Joseph C. Hyatt as the customer's man and agent of the defendants Paul H. Davis & Co.; that the defendant Joseph C. Hyatt maliciously intermeddled and interfered with the







relations between the plaintiff and defendants Paul H. Davis & Co. and caused said defendants Paul H. Davis & Co. to breach their contract with the plaintiff in the respects herein set forth; that when said James S. Templeton's Sons notified the defendants Paul H. Davis & Co. and the defendant Joseph C. Hyatt that they would accept no more sales or purchases of May rye except to close out pending grain accounts, the defendant Joseph C. Hyatt wilfully, deliberately and maliciously and with the intent to injure the plaintiff and wilfully and wantonly in utter disregard of the consequences to the plaintiff, caused said order to buy of to wit May 7, 1946 to appear on the books and records of the defendants Paul H. Davis & Co. as intended to cover the aforesaid short sale and to this end wilfully, deliberately and maliciously falsified said books and records of said defendants Paul H. Davis & Co. thereby causing said order to buy of to-wit May 7, 1946 or purchase made pursuant thereto, to be wrongfully used by the defendants Paul H. Davis & Co. to cover said short sale; to the damage of the plaintiff of \$60,500.00."

The third count concluded with a prayer for judgment for \$60,500 against both the defendant brokers and Hyatt.

The motion of the defendant brokers to dismiss avers in substance that the second amended complaint is vague, indefinite and ambiguous in that (1) "it fails to allege with any degree of particularity the contract, or the terms thereof, upon which this cause of action is predicated," (2) "it does not allege with definiteness and particularity the facts relied upon which constitute the alleged breach of the alleged contract," (3) "it does not show any causal relation between the alleged breach of the contract and the alleged damages to the plaintiff," and (4) "the various paragraphs of the various



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counts are inconsistent with each other."

The motion of Joseph C. Hyatt to dismiss avers that the second amended complaint is insufficient in law in that (1) it "fails to disclose any negligence upon the part of this defendant, Joseph C. Hyatt," and (2) it "fails to disclose any duty contractual or otherwise" on his part to plaintiff.

For a clearer understanding of the allegations of the complaint we deem it appropriate to state that a "short sale" of grain is a sale before purchase, with a view on the part of the customer to purchase at a future time at a lower price. When subsequently a purchase is made to close said sale, such subsequent purchase is known as "covering" the sale and it terminates the transaction. Between the time of the sale and the subsequent purchase, the broker is said "to carry" the short sale for the customer and while he carries it, he generally relies upon the margin placed in his hands as his security against loss by an advance in the market. When the broker makes the short sale he has to deliver the grain sold. How the grain sold is obtained by the broker for delivery to the purchaser is of no interest to the customer.

The only question presented for our determination is whether each or any of the three counts of the complaint contains sufficient well pleaded ultimate facts as to state a cause of action.

The sufficiency of plaintiff's complaint must be considered in the light of the rules that pleadings must be literally construed with a view to doing substantial justice between the parties and that no pleading shall be deemed bad in substance which shall contain such infor-







mation as shall reasonably inform the opposite party of the nature of the claim which he is called upon to meet and the further rule that all pleadings shall contain a plain and concise statement of the pleader's cause of action.

It is immediately apparent that not one of the counts meets the requirement that it shall contain a plain and concise statement of plaintiff's cause of action. All three of the counts are prolix and somewhat confusing and were inaptly drawn but the fact that they were so drafted cannot deprive plaintiff of her day in court, if any one of the counts contains sufficient information to reasonably inform the defendants of the nature of the **claim they are** called upon to meet.

A careful analysis of the facts alleged in the first count impels the conclusion that said count states a cause of action against the defendants. Furthermore, defendants' counsel conceded upon the oral argument of this case in this court that the first count did state a cause of action.

It will be recalled that the second count contains the same allegations as did the first count and, in addition thereto, the averments hereinbefore set forth, which we deem it unnecessary to repeat. While this count contains many allegations of evidenciary facts and others that are redundant and repetitious, such allegations may be disregarded as surplusage. We are of the opinion that the well pleaded ultimate facts alleged in the second count are sufficient to state a cause of action.

As has been seen, the third count seeks recovery against both the defendant brokers and Hyatt in an action in tort. There is not a single allegation of fact contained in this count, which charges said brokers with any



(1) 1913. 1914.

1915. 1916.

1917. 1918.

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1958. 1959.

1960. 1961.

1962. 1963.

1964. 1965.

1966. 1967.

1968. 1969.

1970. 1971.



tortious conduct and the trial court properly dismissed the third count as to said brokers.

The substance of the allegations of the third count as to the defendant Hyatt, is that he, as a customer's man of the defendant brokers and their authorized agent in the handling of plaintiff's account, cleared her purchases and sales of grain through James S. Templeton's Sons, contrary to her instructions and the usual practice of the defendant brokers to clear such purchases and sales through Bache & Co.; that in so doing he intermeddled and interfered with the relations between plaintiff and defendants and thereby caused said defendants to breach their contract with her; and that when the firm of James S. Templeton's Sons notified the defendant brokers and Hyatt on May 7, 1946 that it would accept no more orders for the purchase or sale of May rye, except to close out pending grain accounts, Hyatt wilfully, maliciously and fraudulently caused plaintiff's order of May 7, 1946 to purchase 5 M May rye to appear on the books and records of the defendant brokers "as intended" to cover the "short sale" of 5 M May rye made by her on December 5, 1945, thereby causing the purchase of 5 M May rye on May 8, 1946 made ~~in~~ pursuant to plaintiff's aforesaid order of May 7, 1946 to be wrongfully used by the defendant brokers to cover said short sale, although Hyatt knew that plaintiff's order to purchase of May 7, 1946 was an entirely separate and distinct transaction, which had nothing whatever to do with her short sale of December 5, 1945. In our opinion the allegations of the third count were sufficient to state a cause of action against Hyatt.

The judgment order of the Superior court of Cook county dismissing this case is reversed and the cause is







remanded with directions that the motion of the defendant brckers to dismiss the first and second counts of the second amended complaint be denied and that said defendants be allowed a reasonable time within which to answer said counts; that the motion of the defendant, Hyatt, to dismiss the third count as to him be denied and that he be allowed a reasonable time within which to answer said count; and that such further proceedings be had as are appropriate and necessary.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.







44311

336 I.A. 225

JOSEPH OLBINSKI,  
Appellee,

v.

ESTHER OLBINSKI,  
Appellant.

)  
)  
) APPEAL FROM CIRCUIT  
) COURT, COOK COUNTY.  
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF  
THE COURT.

Plaintiff, Joseph Olbinski, filed a complaint for divorce charging his wife, Esther Olbinski, with cruelty. She filed a cross complaint for separate maintenance charging plaintiff with desertion. After a trial without a jury, the chancellor entered a decree on July 2, 1947, which found defendant guilty of extreme and repeated cruelty, granted plaintiff a divorce on such finding and dismissed plaintiff's cross complaint for want of equity. Defendant appeals.

The parties were married on March 17, 1945 and no children were born of their marriage. Immediately after their marriage plaintiff and defendant and the latter's two children by a former marriage moved into an apartment in a two-flat building owned by plaintiff and his sister in joint tenancy.

Plaintiff testified in substance that while he was lying in bed on October 20, 1945, his wife came into the bedroom and had an argument with him, during the course of which she struck him in the face with a magazine and slapped his face twice with her hand; that he then arose from the bed and went to the telephone to call the police; that as he was trying to use the telephone, she came from behind and "snatched" the receiver from him; that in so doing she







broke one of his fingers; that immediately thereafter, when he showed her his broken finger, she said that she was sorry that she "didn't break all five"; that a short time later a police officer came to their home; and that he told the police officer what had occurred and showed him his finger.

Plaintiff further testified that on January 5, 1947 he was sitting in a rocking chair in the kitchen of his home, while his wife was preparing dinner; that during the course of an argument between them on that occasion, she threw a mixmaster at him and the motor of the mixmaster grazed his foot and broke a piece of wood off the rocker; and that he then went to his sister's home. Said piece of wood was offered and received in evidence.

Thomas Kazakos testified that he was a police officer and that pursuant to a call he went to the Olbinski home on October 20, 1945; that plaintiff showed him his finger and told him in the presence of his wife that she had struck him with the telephone receiver; that she did not say anything; and that Olbinski's finger "looked like it was broken."

The defendant, Esther Olbinski, testified that she did not throw a magazine at plaintiff or slap him on October 20, 1945. Her version of the telephone incident on that date was that while she was trying to prevent plaintiff from using the telephone to call the police, they engaged in a struggle for the possession of the telephone receiver and that while they were so engaged, plaintiff pushed her and knocked her down, hurting "his finger."

As to the incident of January 5, 1947, defendant testified that plaintiff was arguing with her over money and that







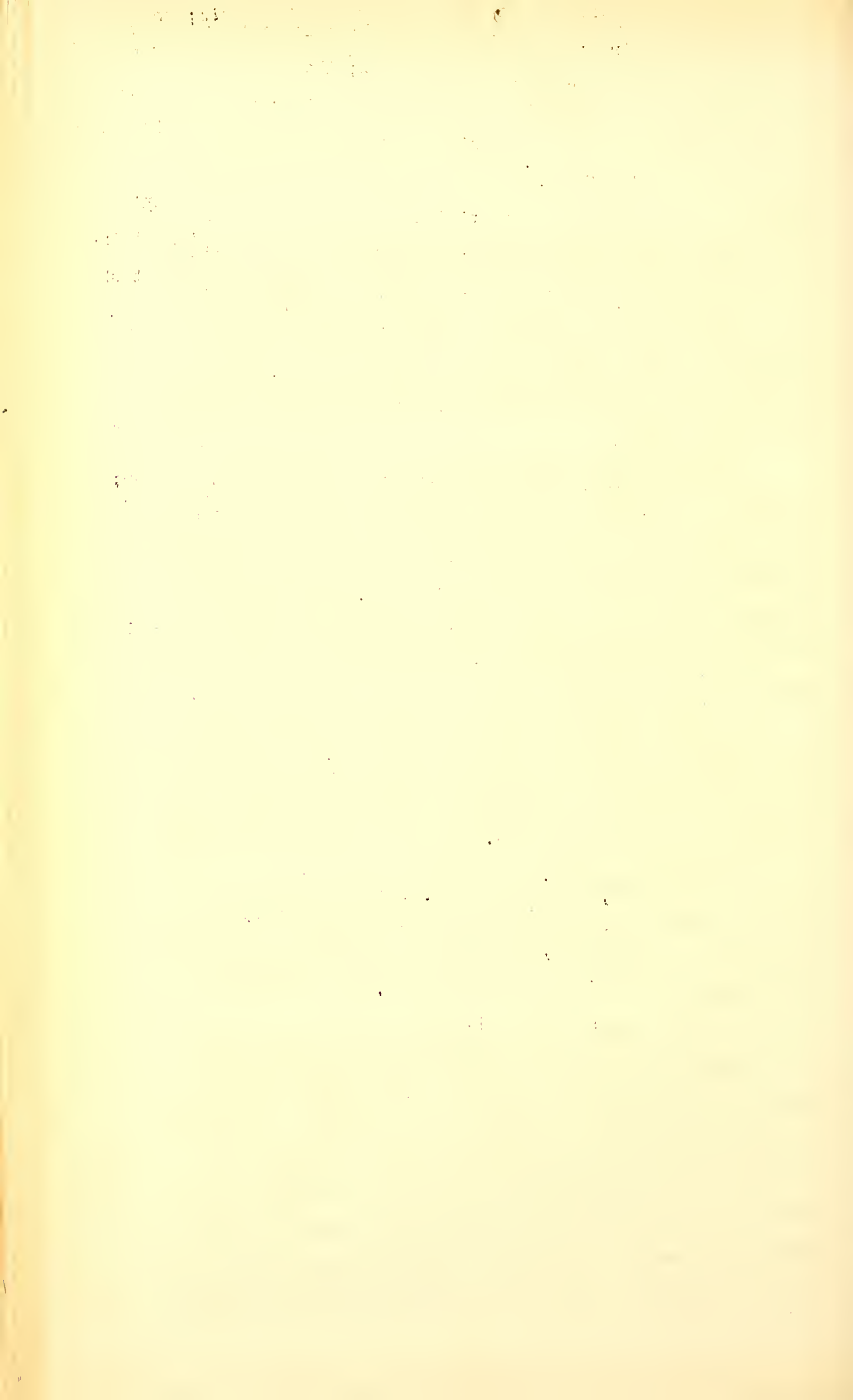
she became excited and dropped the mixmaster on the floor near the sink; that she did not throw it at him; that he was sitting ten feet from the sink; that no part of the mixmaster struck either him or the rocker; and that her daughter came into the kitchen shortly after the mixmaster fell on the floor.

Dolores Skiva testified that she was defendant's daughter by a former marriage; that she lived with plaintiff and defendant ever since they were married; that she walked into the kitchen on the day of the mixmaster incident; that when she entered the kitchen, her mother was crying and plaintiff was sitting in the rocker; that her mother was then picking up the mixmaster from the floor near the sink, which was about ten feet from the rocker; that nothing was said at that time about the mixmaster having been thrown at plaintiff; and that shortly thereafter he went over to his sister's home.

The first question to be considered is whether the finding in the decree that defendant was guilty of extreme and repeated cruelty was against the manifest weight of the evidence.

The nature and extent of proof necessary in a case of this kind is discussed at considerable length in the briefs of the parties. Section 8 of the Divorce Act (par. 9, chap. 40, Ill. Rev. Stat. 1947) provides in part that the cause of divorce must be fully proven by reliable witnesses. However, a different rule applies when the alleged ground for divorce is contested. In Teal v. Teal, 324 Ill. 207, it was held (p. 214) that the degree of proof required







in contested divorce cases "is the same as in all other cases of a civil nature - by the preponderance of the evidence."

The facts and circumstances in evidence, as hereinabove-set forth, pertaining to both of the alleged acts of cruelty are not complicated and it is unnecessary to repeat them. There is a sharp conflict in the testimony of the witnesses but after carefully considering all of the evidence, we are of the opinion that, since the chancellor saw the witnesses and heard them testify and was in a better position than we to judge of their credibility, we would not be warranted under the law in holding that his finding that defendant was guilty of extreme and repeated cruelty was against the manifest weight of the evidence.

Defendant contends that "even if the plaintiff had properly proved the alleged acts of cruelty, his cohabitation with the defendant up to the date of separation, which took place one month after the date of the last alleged act on January 5, 1947, constituted a condonation of both alleged acts."

Plaintiff testified in substance as to his alleged condonation of the previous acts of cruelty of his wife that he returned to his apartment on January 6, 1947, the day after the mixmaster incident; that prior to said incident he and his wife occupied the bedroom off the kitchen and that the bedroom off the dining room, which was reserved for the use of defendant's 22 year old son, was vacant during the period from January 6, 1947 to February 8, 1947, because her son was living at that time with his aunt; that after his return to his apartment on January 6, 1947 he occupied the kitchen







bedroom alone and his wife occupied the bedroom off the dining room; that "while we were separating we had our separate rooms and when she came into my bedroom - I will be frank about it, I said 'Get the hell out and go into the bedroom where you are at.' She said, 'I will sleep where I want to and you can't do anything about it'"; that his wife did sleep in his bedroom with him but "that was her doing"; that he did not kiss her or forgive her for her acts of cruelty "even though we slept in bed there" and that he did not have any sexual intercourse with his wife during the period in question; and that she would not leave him alone at that time and that is why he finally separated from her on February 8, 1947.

The defendant testified that during the period from January 6, 1947 to February 8, 1947 she occupied the kitchen bedroom with plaintiff; that there was only one bed in that bedroom and that she slept in same with him; that during said period she cohabited with plaintiff as his wife; and that her son occupied the bedroom off the dining room.

Defendant's daughter and a young man friend of her's, who was a frequent visitor at her home, testified that plaintiff and defendant occupied the bedroom off the kitchen during the period from January 6, 1947 to February 8, 1947.

Defendant's testimony that her son occupied the bedroom off the dining room during the period in question was completely refuted by her daughter and her young lady roomer, who both testified that her son did not occupy said bedroom at that time, because he was then living with his aunt.







It will be noted that defendant sought to fortify her testimony that she slept with plaintiff in the kitchen bedroom after he returned to the apartment on January 6, 1947 by testifying falsely that her son occupied the bedroom off the dining room at that time. The obvious purpose of such false testimony was to show that there was no bed available for her to sleep in except that in which plaintiff slept. Plaintiff having admitted that defendant did sleep in the same bed with him during the period in question, her false testimony served no useful purpose but it did demonstrate that she was an unreliable witness and that she was willing to even resort to perjury in order to meet her burden of proving her affirmative defense of condonation.

While cohabitation of husband and wife after the commission of acts of cruelty is regarded in law as a condonation of the act or acts previously committed (Moore v. Moore, 362 Ill. 177), the mere fact that plaintiff and defendant slept in the same bed under the circumstances hereinbefore indicated by the evidence, does not in itself constitute condonation. The burden was upon defendant to prove by the preponderance or greater weight of the evidence that plaintiff cohabited with her as his wife subsequent to January 5, 1947. The only evidence in the record, which pertained directly to that question was the testimony of plaintiff and defendant. Her testimony was in direct conflict with his. As has been seen, she testified that they had sexual intercourse subsequent to January 5, 1947 and he testified that they did not.

The chancellor's finding that defendant had failed to







prove that plaintiff had condoned her previous acts of cruelty by cohabitation with her must necessarily have been predicated upon the credibility of the parties as witnesses. Here again the rule applies that, since the chancellor saw the witnesses and heard them testify and was in a better position than we to judge of their credibility, we would not be warranted in holding that his finding in this regard was against the manifest weight of the evidence.

Inasmuch as we have concluded that the chancellor did not err in entering the decree appealed from, insofar as it granted plaintiff a divorce on the ground of extreme and repeated cruelty, it must be held that defendant's cross complaint for separate maintenance was properly dismissed for want of equity.

For the reasons stated herein the decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.







44218

FAY RIDDLESBARGER, )  
Appellee, )  
v. )  
RUFUS RIDDLESBARGER, )  
Appellant, )  
and )  
LANTEEN LABORATORIES, INC., an )  
Illinois corporation, LANTEEN )  
MEDICAL LABORATORIES, INC., a )  
Delaware corporation; and )  
FRED H. BEXELL, )  
Defendants. )

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

336 I.A. 226'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The defendant, Rufus Riddlesbarger, appeals from a decree of the Circuit Court granting plaintiff, Fay Riddlesbarger, a divorce, alimony, solicitors' fees and auditor's expenses.

We had before us on a former appeal (Riddlesbarger v. Riddlesbarger, 324 Ill. App. 176) most of the questions raised in this appeal, except those relating to alimony, solicitors' fees and auditor's expenses. Fay Riddlesbarger's complaint in this proceeding, as appears from our former opinion, alleges, inter alia, that defendant obtained a decree of divorce against her in the City Court of Aurora on February 5, 1932 upon the grounds of desertion; that said decree was void, as that court did not have jurisdiction of the subject matter of the divorce proceeding; that the plaintiff and defendant were residents of Chicago and had never been residents of the City of Aurora; that the matrimonial domicile of plaintiff and defendant had never been in that city; "that in any event, no such desertion could have occurred or did occur within the territorial limits of the City of Aurora"; that







"said decree for divorce did not purport to find that desertion occurred within the territorial limits of the City of Aurora"; that she had never deserted defendant; and that said decree was obtained upon the false and fraudulent testimony of defendant and one other witness. Attached to the complaint and made a part thereof was the record of proceedings in the City Court of Aurora. The complaint therein, verified by Riddlesbarger, alleged that he "is an actual resident of the said County of Kane, and is now, and has been for ten years last past, a resident of the State of Illinois"; that "Fay Riddlesbarger, wholly regardless of her marriage covenants and duty, afterward, on February 28, 1930, wilfully deserted and absented herself from your Orator, without any reasonable cause, for the space of one year and upwards; and has persisted in such desertion, and yet continues to absent herself from your Orator." The decree found, inter alia, that Fay Riddlesbarger had submitted herself to the jurisdiction of the court and filed her answer to the bill; that the complainant had filed a proper affidavit of emergency and that Fay Riddlesbarger had expressly consented to an immediate hearing of the bill; "that said complainant, Rufus Riddlesbarger, is now an actual resident of the City of Aurora, County of Kane, and State of Illinois"; that "the defendant herein without reasonable cause on February 28, 1930 wilfully deserted and absented herself from the complainant, Rufus Riddlesbarger, and has from said date persisted in said desertion,"

The salient facts, none of which are set forth in







defendant's brief, and which we consider essential to a proper understanding of the case, are as follows: Rufus and Fay Riddlesbarger were married July 18, 1919 in the City of Chicago. Two daughters were born of said marriage. The parties lived together as husband and wife until February 28, 1930, and had resided in Chicago continuously after November 1922. In 1925 they moved to 3974 Lake Park avenue in this city, where they were residing at the time of the alleged separation. Neither of them ever lived in the City of Aurora or in Kane County. February 28, 1930 defendant compelled his wife to go to New York, where she temporarily resided until Christmas of 1930. During her absence one Verma Hansen moved into the family residence at 3974 Lake Park avenue in Chicago, where she resided with Rufus Riddlesbarger and the two daughters, who were at that time aged respectively eight and ten years. She lived at the family residence as Riddlesbarger's mistress. They occupied the same bedroom and the same bed, and it is uncontradicted that they were continuously guilty of adultery. About Christmas of 1930 Mrs. Riddlesbarger returned home to the family residence from New York, and her husband and Verma Hansen moved from the Lake Park residence. After about a week or ten days plaintiff, acting under the duress of her husband, was again compelled to go to New York City, whereupon Rufus Riddlesbarger and Verma Hansen for the second time moved into the family residence, where they lived in a state of adultery until about March 1, 1931, at which time plaintiff again came back from New York and took up her







residence at the family domicile. Defendant and his mistress, Verna Hansen, removed from the family home and never again lived there. Fay Riddlesbarger thereafter resided in Chicago with the two daughters.

Rufus Riddlesbarger is a lawyer, but does not practise his profession. He owns substantially all the stock of two corporations that are engaged in the manufacture and distribution of contraceptive devices, and his income at the time of the beginning of these proceedings was about \$90,000.00 per annum. Mrs. Riddlesbarger was a housewife, inexperienced in business affairs.

In October 1931 defendant prepared or caused to be prepared a property-settlement agreement, under the terms of which the parties waived all rights in each other's property, Rufus Riddlesbarger agreed to pay his wife the sum of \$100.00 per month for her own support, and \$50.00 per month for the support of each of the two daughters. In January 1932 defendant, through a former classmate, one Major Charles H. Edwards, a lawyer engaged in the practice of his profession in the City of Aurora, caused to be filed in Aurora a divorce proceeding, charging his wife with desertion. He first sought to induce his wife to institute divorce proceedings elsewhere than in Chicago but she refused, stating that she did not want a divorce. On January 29, 1932 he drove her by automobile, together with one Meryl Foley, to the City of Aurora. Neither of the parties then resided, or ever had resided, within that city. Major Edwards and Rufus Riddlesbarger had employed one Merritt J. Little, a lawyer practising in Aurora, to



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act as nominal counsel for Mrs. Riddlesbarger. She did not employ Little, had never met him before January 29, 1932, nor did she pay him; he was paid by Rufus Riddlesbarger. It is undisputed that Mrs. Riddlesbarger accompanied her husband as the result of his duress and threats that if she did not accompany him and if she interposed a defense to the divorce proceedings, he would take their two daughters and leave with them for South America, and that she would be left penniless and destitute. After arriving in Aurora on January 29, 1932 she attempted to consult with Little, but was prevented from so doing by Major Edwards and her husband. She then expressed a desire to employ independent counsel of her own choice, but Riddlesbarger again threatened that if she interposed any defense to the divorce proceeding or employed independent counsel he would kidnap the two daughters, go to South America and leave her penniless. Acting under the duress of these threats, she was prevailed upon to sign an answer in the proceedings in the City Court of Aurora which had been prepared for her without consultation with her. Major Edwards and Riddlesbarger attempted to prevent her from going into the court room in Aurora on January 29, but she was ultimately permitted by them to sit in back of the room in the large counsel chamber which was utilized as a court room, where she was able to see the proceedings but unable to hear what took place. She did not participate in the proceedings in any way.

Upon the hearing Riddlesbarger testified that he was a resident of the City of Aurora and that his wife had deserted him. Meryl Foley testified that the parties



[illegible]



were living separate and apart. We said in our former opinion (page 180): "that defendant's testimony was perjury and was made for the sole purpose of inducing the judge presiding in the City Court of Aurora to believe that the cause of action, the alleged desertion of defendant by plaintiff, had occurred within the territorial limits of that city, stands admitted." These facts are uncontradicted either by the pleadings or by the evidence. The decree of February 5, 1932 entered pursuant to that hearing, referred to the agreement entered into by Fay and Rufus Riddlesbarger in October 1931. After the entry of the decree Riddlesbarger continued to pay his wife the sum of \$100.00 per month for her support and \$50.00 per month for the support of each of the children, just as he had paid her before the entry of the decree and after the signing of the agreement.

Thereafter, on June 24, 1932, Riddlesbarger married Verma Hansen, with whom he had theretofore been living in the relationship of paramour and mistress for some two years. In 1937 Riddlesbarger began consorting with one Roberta Eames as his mistress. In September of that year he resided with her at the Broadmoor Hotel in Colorado Springs, Colorado, where they represented themselves to be husband and wife. At that time he was admittedly not divorced from Verma Hansen Riddlesbarger, and was purporting to fulfill his residence requirements in order to obtain a divorce from her.

May 10, 1940 Riddlesbarger was in arrears in the sum of \$3255.00 in payment of the amounts agreed by him







to be paid to Fay Riddlesbarger under the property-settlement agreement of October 1931. Fay Riddlesbarger filed a petition in the City Court of Aurora seeking to require Rufus Riddlesbarger to make<sup>up</sup> these arrearages. The parties thereupon entered into an agreement which was enrolled in the City Court of Aurora on January 11, 1941, under the terms of which Fay Riddlesbarger undertook to release Rufus Riddlesbarger from any obligation for support, in consideration of the payment to her of \$20,000.00, and \$3500.00 solicitors' fees. It is uncontradicted of record that Fay Riddlesbarger was ignorant of the fact that the divorce decree of February 5, 1932 was void for want of jurisdiction of the subject matter and of the City Court of Aurora to enter the decree, and that, until about August 1942, she actually believed herself divorced from Rufus Riddlesbarger. Upon learning that her marital status was actually that of being the wife of Rufus Riddlesbarger and not that of being divorced from him, she instituted in the Circuit Court of Cook County on October 8, 1942 the present proceeding for divorce upon the ground of desertion and of defendant's adultery with Verma Hansen before the entry of the decree of February 5, 1932 and subsequent thereto, and thereafter with Roberta Eames. The matter was tried by Judge La Buy, then sitting in the Circuit Court of Cook County, who heard considerable evidence, including the facts hereinbefore set forth. At the conclusion of the evidence Riddlesbarger and his co-defendants made a motion for a finding in their favor. In a lengthy written opinion delivered by Judge La Buy he stated, inter alia, that "The evidence offered







herein discloses that at the time of the filing of said bill of divorce in said city court, the defendant, Riddlesbarger, was not a resident of the City of Aurora nor of the County of Kane in which said City of Aurora is situated. The evidence herein further shows that Fay Riddlesbarger, the plaintiff herein, was induced by threats of the said defendant not to interpose any defense to said bill for divorce; that said defendant employed an attorney for the plaintiff herein, and that said attorney, who pretended to represent plaintiff in said former proceeding, was in reality the agent of the defendant with reference to said proceedings; that there never was any service of process upon the plaintiff herein but that said attorney employed by the defendant entered the appearance of plaintiff herein and appeared in court and represented to the court that the plaintiff herein did not desire to contest said proceedings.

"The institution of the divorce proceedings in said city court and the actions of the defendant with reference to the fraudulent prevention of the plaintiff herein from contesting the said bill for divorce, were the acts of said Rufus Riddlesbarger and the plaintiff in no way participated or joined in the fraudulent representations to the said court in order to lead that court to assume jurisdiction of the defendant's bill for divorce. The defendant herein so played upon the credulity of the plaintiff that she was led to believe the fraudulent statements made by the defendant, and thus did not oppose the supposed breaking of the marriage ties between the plaintiff and defendant. The plaintiff herein was trusting and confiding, while the defendant was masterful and compelling, and thus the defendant







was enabled to obtain a decree of divorce based upon a supposed residence in the City of Aurora when in fact the defendant was not such a resident, and based upon a supposed desertion of the defendant by plaintiff when in truth and in fact there was no basis for such charge of desertion against the plaintiff herein. The defendant was resolved in some manner to rid himself of his lawful wife, and in so doing acted in the perfidious manner disclosed by the record herein.

"This case presents a situation where said Rufus Riddlesbarger in making a false representation in his complaint and in his sworn testimony that he was a resident of Aurora practiced a flagrant fraud upon the said city court of Aurora. By virtue of that fraud that court took unto itself jurisdiction of the person of said Rufus Riddlesbarger, which jurisdiction that court could not have exercised if said Riddlesbarger had truthfully informed that court of the fact with reference to his residence. If those facts had been divulged to the court, it would have immediately held as a matter of law that the court did not have jurisdiction of the person of said Rufus Riddlesbarger, and consequently would have promptly dismissed said action for want of jurisdiction." (Italics ours.)

After reviewing certain cases Judge La Buy set forth Rufus Riddlesbarger's contention that his wife was estopped to question the decree of divorce because of her laches and participation in the Aurora decree after its entry. He then cited certain acts of plaintiff after the entry of the decree, principally Fay Riddlesbarger's petition in the Aurora court







to compel Rufus Riddlesbarger to make up the arrearages in alimony, and concluded by sustaining defendants' motion for a finding in their favor as follows: "The court holds that plaintiff is estopped by her conduct in pais from asserting any rights she may have had because of the claimed invalidity of the 1932 divorce decree."

In our original opinion, Mr. Justice Scanlan, speaking for the court, reviewed the leading cases in this and other states holding that where a plaintiff has induced the court to take colorable jurisdiction by misrepresentation and fraud concerning facts which if true would have given the court actual jurisdiction, the decree is void and is subject to collateral attack at any time, and the fraud may be shown by evidence de hors the record. In two subsequent opinions, Meyer v. Meyer, 328 Ill. App. 408, and Meyer v. Meyer, 333 Ill. App. 450, we adhered to the position taken in the Riddlesbarger case. We said in the Riddlesbarger case that "defendant and his coconspirators perpetrated a brazen fraud upon the City Court of Aurora and thereby induced the judge of that court to enter the divorce decree"; and concluded that the decree was utterly void and subject to collateral attack. The record on the former appeal was precisely the same as the record on this appeal, and under the settled rule in this state, questions of law which have been decided by the Appellate Court upon the appeal of a case will not again be considered on a second appeal. They are binding not only on the trial court in the further progress of the cause, but also on the appellate court in any subsequent appeal. People v. Militzer, 301 Ill. 284; Morganroth v. Pink, 227 Ill. App. 244.







Notwithstanding this state of <sup>the</sup> record, defendant still asserts that the "divorce decree of the City of Aurora was not a nullity," and that our decision on the former appeal is not determinative of the issues involved in this appeal. He argues that on the previous appeal the issues were formed by a demurrer to the evidence of plaintiff, i.e., the granting of defendants' motion to dismiss the complaint, and that since there is no demurrer to the evidence of plaintiff in this appeal, the doctrine of estoppel by equitable defenses is presented for determination. The principal equitable defenses now sought to be interposed are estoppel in pais and laches. The argument underlying the first of these defenses is that Fay Riddlesbarger accepted the benefits of the Aurora decree by assuming custody of the then two minor children of the parties "with the consequence that defendant was deprived of their comfort and companionship." This contention is urged on behalf of a man who, after he had compelled his wife to go to New York, enjoyed the "comfort and companionship" of his two daughters while he maintained his mistress, Verma Hansen, in the family residence. Fay Riddlesbarger's fitness to have custody of the two minor children is unchallenged, and it is certain that under the circumstances here disclosed, no court would in any event have awarded their custody to Rufus Riddlesbarger. Moreover, under the settlement agreement of October 1931, which Riddlesbarger himself prepared and forced his wife to sign, it was expressly provided that she should have the sole custody and control of the children until they should respectively attain the age of eighteen years, and that same agreement expressly provided that she should receive \$100.00







a month for her own support and \$50.00 per month for the support of each child. Consequently the purported Aurora divorce decree gave her nothing that she was not entitled to under the property-settlement agreement. The void decree simply incorporated the terms of that agreement, and she derived no additional benefit whatever therefrom.

The other equitable defense touching upon the question of estoppel in pais is that Fay Riddlesbarger recognized the validity of the Aurora decree by instituting proceedings before the Aurora court in 1940, and it is stated in defendant's brief that "in that proceeding the jurisdiction of the Aurora court to enter the original decree in 1932 was challenged, and the court specifically found in the 1941 decree that it at all times had jurisdiction of the parties and subject matter. ... She [plaintiff] is therefore barred by the 1941 decree from attacking collaterally the 1932 decree of the Aurora court . . . ." That statement is not borne out by the record. In her petition filed May 24, 1940 in the City Court of Aurora, Fay Riddlesbarger made no attack whatever upon the 1932 decree. There is no suggestion in her petition that the decree was not valid. On the contrary she obviously assumed at that time that it was valid. Nor is there anything in Rufus Riddlesbarger's answer putting in issue in any way the validity or non-validity of the 1932 decree. In any event all these matters were taken into consideration by Judge La Buy who held that they constituted estoppel in pais. We were of a contrary opinion, and accordingly reversed the decree entered by him and







remanded the cause.

The remaining equitable defense sought to be interposed by Riddlesbarger is that the lapse of ten years between the entry of the Aurora decree and the filing of this proceeding, constituted laches. The evidence is uncontradicted that Fay Riddlesbarger steadfastly believed during those ten years that she had effectively been divorced by the decree of the City Court of Aurora in 1932, and was not apprised of the nullity of that decree, because of the lack of jurisdiction of the court of the subject matter, until shortly before she filed this proceeding in 1942. It is fundamental that laches does not operate against a party ignorant of his or her legal rights. It would be grossly inequitable to invoke an equitable principle in favor of a party who had perpetrated such brazen fraud upon a court in procuring a decree.

Substantially all the arguments made by defendant in support of his so-called equitable defenses, and the cases upon which he relies, are fully discussed and, we think, effectively answered in Riddlesbarger v. Riddlesbarger and the two cases of Meyer v. Meyer, supra, and need not be reiterated here.

The only other question presented relates to the propriety of the chancellor in awarding Fay Riddlesbarger \$100,000.00 alimony in gross, \$30,000.00 solicitors' fees, and \$1250.00 for auditor's expenses. Preliminary to the discussion of these items, defendant's counsel argue that the 1941 settlement agreed upon by the parties and incorporated into the decree of the City Court of Aurora, is a binding contract between them and presently enforceable







as such. It will be recalled that the order of January 11, 1941 simply enrolled upon the records of the Aurora Court the terms of a property settlement agreement by which Mrs. Riddlesbarger received \$23,500 and undertook to release her husband from his obligation to support her. Since we held in our former opinion that the Aurora decree was utterly void and adhering, as we do, to that conclusion, everything that was done pursuant to the entry of that decree was a nullity. Fay Riddlesbarger made that settlement under the misapprehension that she had been divorced from her husband. He was some \$3500.00 in arrears under the agreement of October 1931, and Fay Riddlesbarger undoubtedly welcomed a financial settlement with him upon the erroneous assumption that their marital relationship had been severed and that it would be a source of constant annoyance, in all likelihood, to attempt to collect what he had promised to pay her in the settlement agreement of October 1931. In any event, the order of January 11, 1941 was essentially an attempt on the part of Riddlesbarger to release himself from his obligation to support his wife, and under the decisions in this state such contracts are illegal on grounds of public policy. Berge v. Berge, 366 Ill. 228; Vock v. Vock, 365 Ill. 432; and Van Koten v. Van Koten, 323 Ill. 323. Moreover, the master and chancellor took this attempted and totally inadequate <sup>settlement</sup> ~~amount~~ into account in awarding gross alimony in the sum of \$100,000.00.

The authorities are in accord in holding that the allowance of alimony in gross is clearly within the scope of the court's jurisdiction where specific circumstances justify an allowance in gross. Doyle v. Doyle, 268 Ill.







96; Bobowski v. Bobowski, 242 Ill. 524; Champion v. Myers, 207 Ill. 308; and the early case of Dinet v. Eigenmann, Admr., 80 Ill. 274, which has since been consistently followed and wherein the court said: "Under this provision [sec. 6 of the Divorce Law, R. S. 1845, p. 197], it has been repeatedly held that the court may, if the justice of the case requires it, decree a sum in gross in satisfaction of yearly alimony, and even a portion of the husband's real estate in fee to the wife. Where, under the law in force when the marriage in this case occurred, the wife had money which became the property of the husband by marriage, and a divorce followed, it was but equitable and just that she should have all or a portion of it restored to her." The special circumstances justifying an allowance in gross in this proceeding are twofold:

(1) The uncontradicted evidence discloses that Fay Riddlesbarger made a substantial contribution in cash that created Lanteen Laboratories, Inc., and made the existence of the business possible. She made an initial contribution of \$12,000.00 to the corporation, having procured that money from her mother. The certificate of incorporation of Chinolene Products Company of August 29, 1928 expressly shows that she subscribed \$9000.00 for 900 shares, that she was a director, and that in October of that year the name was changed to Lanteen Laboratories, Inc. There is no dispute in the record as to these facts, although the books of Lanteen Laboratories, Inc. would have been a complete refutation if Fay Riddlesbarger's testimony were untrue. (2) It is obvious from the record that there must be an allowance in gross in this case if Fay Riddlesbarger







is ever to receive any alimony at all; a periodic allowance could not be collected. Since the service of the summons in this proceeding, defendant has continuously lived in Hereford, Arizona, out of the jurisdiction of the court. The contempt process of a court of chancery ordinarily relied upon to collect a periodic allowance of alimony would be entirely useless in the case at bar because defendant resides outside the jurisdiction of the court. He refused to comply with the order requiring him to appear for examination, and there was no practicable means of enforcing it. The same situation would prevent the enforcement of a periodic payment of alimony. Furthermore, it is apparent that defendant is siphoning his assets out of the State of Illinois. Pending this proceeding, he set up a trust under which his daughter, Gwendolyn Riddlesbarger, was the beneficiary, and conveyed to that trust 600 shares of the Class A common stock of Lanteen Laboratories, Inc. of the admitted value of \$30,000.00. He has sold to the corporation and taken out cash for 1038 shares of class A stock of the admitted value of \$51,900.00, and transferred 500 shares of the class A common stock of the admitted value of \$25,000.00 to Verma Riddlesbarger, his second wife. During the pendency of these proceedings he has siphoned out of the State of Illinois assets in excess of \$111,900.00, and it is a fair inference that he will continue this course unless there is an allowance in gross which can be immediately collected.

Bearing upon the propriety of the amount of \$100,000.00 awarded to Fay Riddlesbarger, the record discloses the following income reported by him on his income-tax returns in







prior years: in 1941, \$26,626.79; in 1942, \$30,009.63; in 1943, \$39,140.02; and in 1944, \$39,483.79. The record further shows that Riddlesbarger was the owner, on May 17, 1945, of 2415 shares of class A common stock of Lanteen Laboratories, Inc. and 17,593 shares of class B common stock. On March 17, 1943 he was the owner of 2123 shares of class A common stock and 19,593 shares of class B common stock. The proportion of the corporate income allocable to the stock owned by him for the years 1941 through 1944 was as follows: in 1941, \$55,907.17; in 1942, \$63,065.59; in 1943, \$119,882.40; and in 1944, \$6302.49; and his total income, including both income received and allocable because of stock ownership, was as follows: in 1941, \$82,533.96; in 1942, \$93,152.72; in 1943, \$150,540.22; and in 1944, \$35,352.80. His counsel argue that the corporate income allocable to his stock holdings should not be treated as his personal income because, they say, it was not actually distributed to him, but the record refutes this contention. It appears that on May 31, 1944 he withdrew \$8500.00 from the corporation by the process of selling 170 shares of the class A common stock to the corporation for \$8500.00. In 1945 he withdrew from the corporation \$51,900.00 by the process of exchanging class B stock for class A stock and selling 1038 shares to the corporation for \$51,900.00. These circumstances disclose that he was actually withdrawing corporate income. His holdings undoubtedly control the entire dividend policy of the corporation, and he can, if he chooses, withdraw any part of the corporate income allocable to his stock holdings.







Rufus Riddlesbarger is a man of considerable means. The book value of his stock holdings, as disclosed by the consolidated balance sheet of Lanteen Laboratories, Inc. as of December 31, 1944, was \$535,769.52. In addition to that, the book value of the stock of Lanteen Realty Company held by him as of the same date, was \$110,134.43. His total stock holdings in these two companies were of the book value of \$645,903.95. Although an attempt was made upon the hearing to minimize the book value of these holdings, they are to be determined from his own declarations appearing upon the books of the corporations, which he himself controls. As an illustration of the disparity between values, it appears from the appraisal introduced by Riddlesbarger that the land and buildings on his ranch in Arizona are valued at \$56,088.00. Obviously, this figure is too low, since it appears from the balance sheet of the Lanteen Realty Company that the cost of the ranch, exclusive of livestock inventory, was \$159,652.19. We think that upon this showing of his assets the award of \$100,000.00 is not at all excessive. Mrs. Riddlesbarger was born April 10, 1897, which makes her now approximately 51 years of age, and if her normal expectancy is to be fixed at 20 to 25 years, the amount of the allowance would be no more than is necessary to assure her proper minimum support for the remainder of her life.

The master recommended, and the court awarded, \$30,000.00 as the fair value of the services rendered by her counsel. Considerable evidence was adduced upon this phase of the case. Mr. Abraham, her attorney, testified that the value of the services rendered by him and his



and it is not possible to find a single word in the  
dictionary which would give the meaning of the word  
which is used in the text. The word is not found in  
any of the dictionaries which I have consulted. It is  
not found in the dictionary of the French language.  
It is not found in the dictionary of the English language.  
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associates was reasonably valued at \$65,000.00. Independent counsel, testifying for plaintiff, fixed the customary fee as between \$50,000.00 and \$60,000.00, whereas one of defendant's witnesses was of the opinion that the services were worth between \$10,000.00 and \$15,000.00. We do not consider it necessary to review in detail the character and extent of these services. It is sufficient to call attention to the testimony of plaintiff's counsel that about four months were spent for preparation before this proceeding was filed. The cause was vigorously and ably contested, motions were made before several judges, the case was tried before Judge La Buy, then heard before Judge Feinberg, who indicated that a divorce decree would be entered, and referred the cause to a master to take testimony as to the amount of alimony and solicitors' fees. When Judge Feinberg was assigned to the Appellate Court the cause had to be heard again before Judge Dunne, who entered the decree from which this appeal is taken. The record in the cases consists of four volumes running into several thousand pages. The conduct of the proceedings to the date of the decree covered a period of about four years and seven months, and included two appeals. Compensation to plaintiff's attorneys was in effect contingent, because Fay Riddlesbarger had no money with which to pay her solicitors unless she prevailed. From these facts and our own familiarity with these proceedings, we think that the sum of \$30,000.00, recommended by the master and carefully considered by the chancellor before entering the decree, is reasonable.

The remaining item of \$1250.00 represents accounting







services. Arthur J. Goldberg, who performed these services, is a certified public accountant. He testified that he devoted 41 hours to his work, including conferences, analysis of financial statements and testimony in court and before the master. A detailed time sheet was introduced. There was no countervailing proof. It requires no mathematical demonstration to conclude that these charges are not excessive.

The record and the points raised, except for the questions of alimony, solicitors' fees and auditor's expenses, are precisely the same as those raised on the prior appeal, and all those questions were determined adversely to defendant's contention in Riddlesbarger v. Riddlesbarger, 324 Ill. App. 176. For the reasons indicated the decree of the Circuit Court should be affirmed in all respects, and it is so ordered.

Decree affirmed.

Sullivan, P. J., and Scanlan, J., concur.







44597

FRANK B. ORRICO,  
Appellant,

v.

MILTON A. BROWN, d/b/a  
BROADWAY BUILDING AND  
CONSTRUCTION CO.,  
Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

33511.226

April 14, 1947 plaintiff contracted in writing with the defendant, Milton A. Brown, doing business as Broadway Building and Construction Company, for the construction of living quarters, consisting of four rooms and bath, above plaintiff's garage at 1004 North 18th street, Melrose Park, Illinois, for which he agreed to pay defendant the sum of \$4000.00, \$3000.00 thereof to cover pay roll and material expense, and the balance of \$1000.00 to be paid upon satisfactory completion of the job. The complaint alleges that defendant "removed the old roof of said garage and performed all rough work for the four side walls and affixed thereon the new roof," for which plaintiff paid him on account the sum of \$2700.00; that defendant then abandoned the project, and "the work thereon remains incomplete."

July 16, 1947 plaintiff brought suit against defendant for breach of contract, alleging damages in the sum of \$10,000.00. Defendant was personally served with summons, but entered no appearance, and thereafter on September 19, 1947 plaintiff moved for and obtained an order of default. Subsequently on October 8, 1947, pursuant to notice on defendant, plaintiff moved for entry of judgment in the sum of \$10,000.00. The court denied his motion, instructing plaintiff, as he states in his brief, "to submit further evidence." May 17, 1948 plaintiff served notice on defend-







ant that on May 20, 1948, he would appear in court and move for judgment "upon the evidence submitted." Defendant again failed to appear, and plaintiff states that he "testified that the cost of completion of the contract with defendant was \$10,000." The court found defendant guilty and judgment was entered in favor of plaintiff for \$3000.00, from which he appeals, claiming the assessment of damages and judgment is inadequate. No brief has been filed by defendant.

The record consists of the complaint, the contract with plans and specifications, notices of motions and orders thereon, the judgment order, praecipe for record, and notice of appeal. No report of proceedings is presented, and there is nothing to indicate or suggest the nature or extent of evidence offered by plaintiff as to the damages sustained in completing the work. He merely states in his brief that he "testified that the cost of completion of the contract with defendant was \$10,000.00." The law is well settled that in the absence of a transcript of the evidence or a report of proceedings, the presumptions, on appeal are in favor of the action of the trial court, and the burden is upon the appellant to point out in the record any error which would warrant the reviewing court to reverse or modify the order of the trial court. 1400 Lake Shore Drive Corporation v. McAninch, Ill. App. Court No. 44496, filed 11-16-48; Kilpatrick v. Schmitt, 303 Ill. App. 15; and In re Estate of Murray v. Appeal of Murray, 310 Ill. App. 121.

In the scant brief filed by plaintiff, he takes the position, quoting from 25 C.J.S. Damages §74, <sup>that</sup> "in case of a breach of contract the measure of damages is the amount which will compensate the injured person for the loss which a ful-







fillment of the contract would have prevented or the breach of it has entailed. In other words, the person injured is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed." There is authority to sustain this proposition of law, but we know of no case which holds that a plaintiff who claims to have sustained damages may recover the entire amount of his ad damnum without competent evidence to prove that he was injured to that extent. We have no way of determining from the record what evidence was adduced by plaintiff in support of his contention. Presumably the trial judge found that plaintiff would be amply compensated by the assessment of damages in the sum of \$3000.00, and we would not be justified upon the record presented in reversing or modifying the judgment entered.

Accordingly, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.







44451

MARY LEE GOOD,  
Appellee,

v.

CORA LEE JOHNSON,  
Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

336 I.A. 227

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Mary Lee Good filed her amended complaint charging that while a tenant in defendant's rooming house the latter, in the presence and hearing of other persons, slandered plaintiff by use of the following language: "You are a whore. You have been sleeping with a man while your husband is in the army." Defendant denied the use of the slanderous words and pleaded justification. There was a trial by jury and a verdict in favor of the plaintiff for \$500. From a judgment on the verdict this appeal is taken.

Defendant assigns two specific errors: (1) that the verdict was against the manifest weight of the evidence, and (2) that the court erred in giving to the jury plaintiff's tendered instruction No. 7.

Plaintiff's testimony is substantially to the effect that she had lived for some months in defendant's rooming house at 4741 South Indiana Avenue, Chicago, Illinois, occupying a room which she rented from the defendant for \$5.25 a week; that, returning to her room after a period of confinement at Provident Hospital where she gave birth to a baby, defendant, though requested by plaintiff, refused her admittance to the room, notwithstanding the rent had been paid in advance prior to her leaving for the hospital; that defendant in the presence of 10 or 15 persons stated to plaintiff that she did not want any children in the house and then spoke the actionable







2.

words set forth in the amended complaint; that, at the time of this alleged conversation plaintiff's father was present, and then accompanied by him she took her infant child to a room occupied by the father at 5237 Indiana Avenue. Plaintiff denied that the slanderous statement made by defendant was true. Her testimony is substantially corroborated by that of her father, Ernest Robinson.

Defendant denied the use of the offending words and offered several witnesses who testified to improper conduct on the part of the plaintiff.

There was a disputed question of fact as to whether or not the actionable words were spoken. Both plaintiff and defendant were corroborated in their contradictory versions. Under the circumstances, we are of the opinion that it was a question of fact for the jury to determine whether the words were spoken and what effect, if any, should be given the plea of justification, and that the jury's finding in favor of the plaintiff is not against the manifest weight of the evidence.

The instruction complained of is as follows:

"The jury are instructed that in an action of slander, the law implies damages from the falsely and maliciously speaking of actionable words and also that the Defendant intended the injury the slander is calculated to effect. In this case, if the jury believe from the evidence, and under the instructions of the court that the Defendant falsely and maliciously and in the presence and hearing of divers other persons said to the Plaintiff, that you are a whore, you have been sleeping with a man while your husband was in the army, and again, in the presence and hearing of divers other persons said to the Plaintiff, you are a whore, and that the Defendant has failed to prove her plea of justification by a preponderance of the evidence, then the jury are to determine from all the facts and







3.

circumstances proved what damages ought to be given and the jury are not confined to the mere pecuniary loss or injury sustained by the Plaintiff, if any, but the jury may allow exemplary damages as punishment."

Complaint is made that the instruction is erroneous because the plaintiff had waived all pecuniary damage. The record viewed as a whole does not support the assertion. It is well settled that the words here used are actionable per se, Iles v. Swank, 202 Ill. 453, Schmisseur v. Kreilich, 92 Ill. 347, and where words are actionable per se that the law will imply pecuniary damage, White v. Bourquin, 204 Ill. App. 83.

Complaint is made that the instruction did not define what constitutes actionable words. We think the instruction properly informed the jury as to the language which was actionable and that under all the facts and circumstances they were justified in believing that the actionable words were spoken. We do not believe the instruction to be subject to any of the objections made and are of the opinion that the giving of the instruction did not constitute reversible error. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Feinberg, P.J., and Niemeyer, J., concur.







44326

IRMA NAGY,

Appellant,

v.

THEODORE KARRELS, ROBERT H.  
CUMMINGS and JOSEPH MORONEY,

Defendants.

JOSEPH MORONEY,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

336 I.A. 308

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 30, 1945 Irma Nagy filed a complaint in chancery in the Superior Court of Cook County against Theodore Karrels, alleging that on June 24, 1941 she was above middle age, a native of Hungary, "with an imperfect knowledge of the American language and customs," and with little experience in business affairs, all of which was or should have been known to defendant; that she was the owner of certain improved real estate in Porter County, Indiana; that she employed defendant, a licensed real estate broker, to sell the real estate on her terms; that under the false representation that she was signing papers to obtain a loan, defendant caused her to execute a quitclaim deed dated July 7, 1941 and recorded July 16, 1941, conveying the real estate to Joseph Moroney; that on July 16, 1941 Moroney, by warranty deed, conveyed the real estate to Joseph Sylvester and Henry Sylvester, as joint tenants and not as tenants in common, which was recorded on July 16, 1941; that Moroney was an employee, agent or nominee of Karrels; that Karrels received the consideration for the deed to the Sylvesters;







that she did not know of the existence of the deeds until "long after" they were recorded; that she received no consideration therefor; and that defendant wrongfully failed to account for or pay to her the moneys received from the Sylvesters. Plaintiff prayed that the defendant be required to answer certain interrogatories; that he account for and pay to her the moneys received by him or by anyone for his use in connection with the sale of the real estate, or, in the alternative, that judgment be entered for her and against him for all damages suffered by her because of his wrongful acts. Attached to the complaint is a copy of a receipt dated June 24, 1941, wherein defendant acknowledged that he received certain documents from her, also a copy of a quit claim deed from plaintiff to Joseph Moroney, and a copy of the deed from the latter to the Sylvesters.

Karrels filed an answer and amended answers stating that he, as a real estate broker, was employed by plaintiff to sell her real estate; that on July 1, 1941 and again on July 2, 1941, he informed her that he had persons ready, able and willing to purchase the real estate upon the terms and conditions set forth in the "exclusive sales contract" and option; that plaintiff refused to accept the purchaser or to comply with the sales contract and option; that the names of the proffered purchasers were Joseph Sylvester and Henry Sylvester; that on July 12, 1941 Robert H. Cummings, then a real estate broker, informed him, defendant, that plaintiff had sold and conveyed her real estate to Joseph Moroney; that Moroney was willing to sell for \$4,200 cash,







with appropriate adjustments; that Cummings said that Moroney would pay a commission to him, defendant, if he produced a purchaser; that he replied that he had a purchaser; that negotiations commenced which resulted in an agreement for the purchase of the real estate by the Sylvesters; that the purchasers paid \$200 down and the balance, making a total payment of \$4,267.35 on July 21, 1941; that defendant was paid \$100 as his commission on the sale; that the purchase price was paid to Cummings as agent for Moroney; that he obtained the purchase price from the purchasers as their agent and delivered the amount, less his commission, to Cummings, who was acting for the seller; and that he, defendant, acted in good faith.

On February 1, 1946 plaintiff, by leave of court, joined Robert H. Cummings and Joseph Moroney as additional parties defendant. In the amended complaint plaintiff then made the additional charge that the three defendants confederated, conspired and colluded to defraud and deprive her of her parcel of real estate and of the proceeds thereof; that under the false oral representation that she was signing certain papers to obtain a loan, they caused her to execute a quitclaim deed; and that she received no consideration therefor. An order of default was entered against Joseph Moroney. In a petition accompanying a motion to vacate this order Moroney stated that he had not filed an answer because Cummings advised him that it would be unnecessary for him to do so, as he, Cummings, would adjust the matter. In the petition Moroney denied that he conspired to defraud plaintiff, or that he at any time made any false representations to her; and asserted that his connection with the transaction was as a nominee. The court set aside the default against Moroney and allowed his petition to stand as an answer. On July 1,







1946 the chancellor entered a decree dismissing the complaint for want of equity as to Karrels. On October 25, 1946 the court entered a default judgment in favor of plaintiff and against Cummings for \$4,267.35 and continued the cause as to Moroney. A hearing before the chancellor on the cause against Moroney resulted in a decree, entered July 2, 1947, dismissing the complaint and amended complaint for want of equity. Plaintiff, appealing, asks that the latter decree be reversed and that the cause be remanded with directions to enter judgment for her and against Moroney. There was no appeal from the decree dismissing Karrels.

The evidence shows that on June 24, 1941, plaintiff, a widow then 53 years of age, employed Theodore Karrels, a Chicago real estate broker, to sell certain real estate owned by her. The real estate, located in Porter County, Indiana, was improved by a cottage. She was born in Hungary and had been in the United States 25 years. Her education consisted of attendance at elementary school, high school and a "teachers' college for kindergarten." She testified through an interpreter. The latter stated that plaintiff spoke English "but very poorly and very confusedly." During the course of plaintiff's examination the interpreter also said: "She will give you her story. She hardly needs an interpreter." Karrels stated that the reasonable market value of the property was \$4,200. On or about July 1, 1941, Karrels procured a purchaser, but she refused to sell. She then contacted Robert H. Cummings, a real estate broker. There was testimony to support the charge that Cummings, on the false representation that she was signing application papers for a loan, induced her to sign a quitclaim deed to Joseph Moroney dated July 7, 1941 and purporting to be acknowledged before Joseph K. Schmidt, a notary public, on July 10, 1941. She testified that she did not acknowledge







the instrument. The deed was recorded on July 16, 1941. Later a warranty deed was executed by Moroney conveying the real estate to Joseph Sylvester and Henry Sylvester, dated July 16, 1941, and acknowledged by Moroney on the same day before Ernest J. Kruse, a notary public. This deed was recorded on July 16, 1941 at 4:15 p.m. the same hour and day as the first deed.

Karrels testified that on July 12, 1941 Cummings told him that he had made a deal with plaintiff; that the property would be for sale by Moroney; that he saw the deed from plaintiff to Moroney; that he received the deed from Moroney to the Sylvesters; that Karrels and Cummings met at the office of the Chicago Title & Trust Company; that then Cummings delivered to him, Karrels, the deed from Moroney to the Sylvesters;<sup>and</sup> that he, Karrels, as agent for the Sylvesters, paid to Cummings \$4,267.35 as the full purchase price, and received a receipt and a closing statement from Cummings. Plaintiff received no part of this sum. At this time plaintiff was visiting in Pennsylvania and did not return until August, 1941.

Moroney testified that he never saw plaintiff; that he did not know her address; that he was employed by the Smith Shoe Company; that he was in the real estate business as a side line; that he first met Cummings in 1938; that prior to 1941 he had dealings with him; that Cummings, "for the benefit of Mrs. Nagy," told him he got a loan on the property; that Cummings asked him to take title to the property; that he had no knowledge that the property had been sold until September, 1941, when he received \$100 from Cummings, who told him it was for the loan application. He







testified that Karrels found a buyer for the property and made out the deed, but that Cummings did not tell him until September, 1941, after he, Moroney, had received \$100 from Cummings, that he had sold the property to the Sylvesters; that he, Moroney, did not know what had been received for the property; and that he did not ask Cummings what plaintiff had received until two weeks before he, Moroney, testified. He testified further that he filed an application for a \$1,500 loan in Michigan City, but did not know the name of the lender or the address; that he gave the application to Cummings, but did not go to the loan agency; that he did not keep a copy of the application; that he did not ask Cummings for a copy of it; that he did not sign a note in connection with the loan, or know the terms of it; and that he was told that the \$100 which he received about a month after he applied for the loan was for lending his credit to secure the loan to save plaintiff's property.

Plaintiff testified further that between July 1 and July 4, 1941 she was taken by Cummings to a bank in Michigan City to obtain a \$1,500 loan. She stated: "Joseph Moroney was the driver to take her down to the trip to the bank." (Record 210.) She stated that she signed the papers at the bank in good faith for the purpose of obtaining the loan money; that the papers she signed were folded; that she saw no writing on them; that she never asked Moroney to take title either for loan or conveyance purposes; that she never asked Moroney to obtain a loan for her on the property; that she did not have any communications from Moroney; that his name was never mentioned in any conversations or dealings between her and Cummings; that there were no judgments







against her; that she did not know who bought her property; and that she never received anything for the property. During the hearing the court said: "What is your question; if you admit she signed a quit claim deed to Moroney, you are asking whether she did." Thereupon the attorney for plaintiff stated: "She knew she was signing it to Moroney."

(Record 206-7.)

Plaintiff maintains that the chancellor erred in finding the issues against her. Moroney acted as a nominee. The testimony of both plaintiff and Moroney is vague, probably due to the long delay in filing the complaint. Plaintiff did not supply any valid reason for this delay. The evidence shows that Cummings defrauded plaintiff. The chancellor who heard the evidence and saw the witnesses was in a better position than we to evaluate their testimony. Plaintiff failed to establish that Moroney defrauded or took part in a conspiracy to defraud her. The finding of the chancellor is supported by the evidence.

The second point urged by plaintiff is that the court improperly admitted Moroney's testimony as to a written application for a loan, without production of the original. He did not testify as to the contents of the application. It was proper for him to testify that an application was made. The court did not err in receiving this testimony. Plaintiff also asserts that the court erred in overruling her motion to strike out Moroney's testimony that he was told that the \$100 he received was for lending his credit rating to secure the loan to save her property. Under the







charge of fraud and conspiracy it was proper for him to show anything that was relevant to support his contention that he was innocent of wrongdoing and that he acted in good faith. He had a right to show that he was told that the \$100 he received was for lending his credit rating. In our opinion the court ruled correctly in admitting this evidence.

For the reasons stated, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.







44312

GRANT J. COWHER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD  
COMPANY, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

336 I.A. 308<sup>2</sup>

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Grant J. Cowher filed a complaint in the Superior Court of Cook County against The Pennsylvania Railroad Company under the Federal Employers' Liability Act, (45 U. S. C. A. Sections 51-60) for injuries sustained while in its employ on February 1, 1945, when, he alleged, he slipped off the top of a snow and ice-covered box car. The jury returned a verdict of not guilty. Plaintiff's motion for a new trial was overruled and judgment was entered on the verdict. Appealing, plaintiff asks that judgment be reversed and that the cause be remanded for a new trial.

Plaintiff, aged thirty, was working for the defendant as a yard brakeman in its classification yard at Altoona, Pennsylvania. This position required him to ride cars off the hump for the purpose of classifying them. A hump is a hill over which the engine pushes cars of mixed destination. As each car reaches the top of the hill from one side, a rider mounts the car and tests the brakes, and if he finds the car safe to ride, signals the pin puller on the ground, who then cuts that car loose from the train and the car is allowed to drift down the other side of the hump by gravity. The brakeman controls the speed of the car by means of the handbrake situated on the top and end of the car. As the car rolls down the track it is switched automatically en-route so that it eventually reaches a track onto which come



*Journal of Management Inquiry* 18(6)



all cars being shipped to a similar destination. In this manner cars are classified, that is, cars of mixed destination in a train are grouped together on different tracks so that when a new train is made up each car or group of cars will be able to <sup>be</sup> cut off from the same end as its destination is reached.

On February 1, 1945, about 11:55 p.m., plaintiff was injured while so classifying cars. He had started work at 3:00 p.m., and after having finished 8 hours of work, continued working, intending to work another 8 hours immediately and making a working day of 16 hours. This was a cold dark night and there was ice and dirty snow about the yard to a depth of about 6 inches. It had not snowed for a number of days in this locality, but the snow had melted and frozen again, leaving a dirty icy crust on the top. None of the cars plaintiff had previously ridden in that night, however, had ice and snow on them. The hump on which plaintiff was working had 2 tracks running from east to west over the hump hill. The tracks were about 10 feet apart and on each side were looked down upon by the yardmaster's office and the conductor's tower, so that the tracks ran between these two buildings, which were about 25 feet apart. The tracks are connected by a cross-over track. The north track was designated as No. 2 track and the south track was called No. 1 track. As the cars were pushed over the hump, the engine was at the west end pushing east, and the cars on the apex of the hump were at the east end of the train. The cross-over track connects with a third track called a slide track, which was located just north of No. 2 track. On this slide track are placed cars that are cut out of the humping train and not ridden down by riders because such cars are found unsafe to ride.







At the top of the hump and adjacent to track No. 1, or the south track, is a two story office building facing north, or toward the two tracks. This building was located about 4 feet south of the nearest rail of track No. 1. The second story of this building was the office of the yardmaster, who is the superior in charge of the hump. His office, by means of open window apertures, looks down upon the cars being ridden over the hump. These window openings are located 4 feet over the tops of the cars and 4 feet to the side of them. In this office with the yardmaster are two switchmen who operate the buttons automatically switching the cars as the riders ride them down the hump by gravity. On the other side of tracks Nos. 1 and 2, and located directly across from the yardmaster's office, is the conductor's tower, which is, like the yardmaster's office, two stories high. Its open window like apertures likewise are about 4 feet over the tops of the cars moving on the hump tracks. The cars are approximately 18 to 20 feet high. From these openings the conductor faces both the tracks and the yardmaster's office and he is able to look directly down on the cars and their riders and can likewise see the engine at the west end. The conductor is always in the tower controlling movements of the train, directing the riders and stopping and starting the train when the hump runs out of riders, or when bad cars have to be taken out because they are unsafe to ride down. The hump conductor was in complete charge of the operation of the hump. Usually, however, there are two conductors on the hump supervising the movement. One is in the tower and another on the ground, whose duty it is to see that the riders are on the brake platform of the cars before being cut off. There are



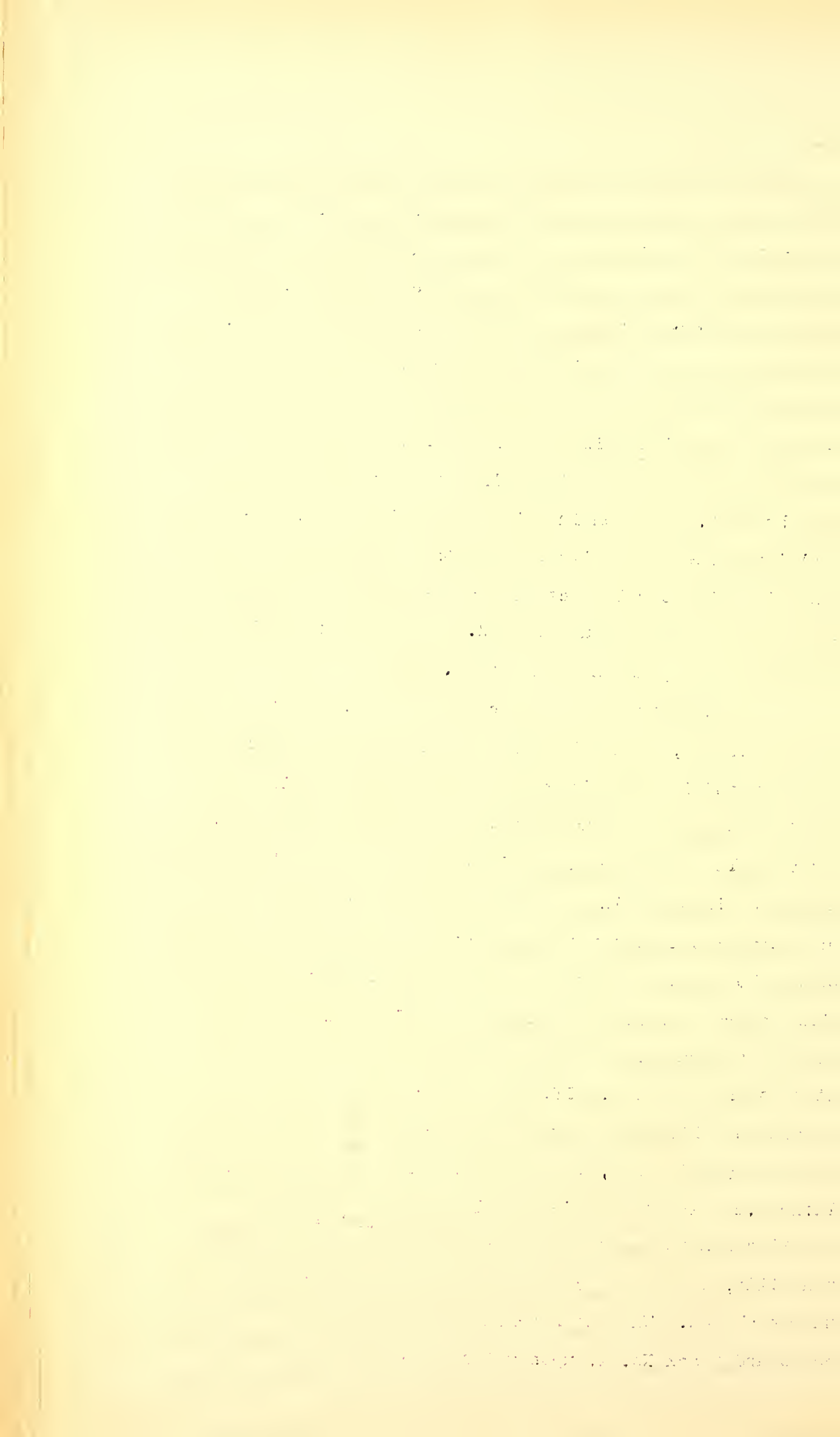




a number of lights so arranged on the yardmaster's building that in the night time they illuminate the top of the hump and shine on the tops of the cars being pushed between the yardmaster's office and the conductor's tower. Both the conductor and the yardmaster could look down upon the plaintiff and had a clear and uninterrupted view of the tops of the cars and could see the condition of the cars he was about to ride. Another official located on the hump was a safety man, whose duty it was to see that all cars were safe to ride. To the west, or ascending side of the hump, cars being classified passed over pits between the rails of the track, in which pits car inspectors examined the cars as they came into the yard and passed overhead. They inspected the underside of the cars, and not the roofs.

In riding cars off the hump the brakemen mount the car at the brake end, climb the side ladder, cross over to the end ladder and into the brake footboard. Ninety nine out of a hundred box cars are equipped with brake footboards, or platforms. The footboard is a platform upon which the brakeman stands in operating the hand brake, which consists of a horizontal wheel or a vertical shaft. The platform is situated at the end of the car and about 2 feet below the roof. When a brakeman is standing on this platform the wheel of the handbrake is about 2 feet above the car, or waist high to the brakeman. If, after checking his brake, the platform and his general working location, the brakeman finds the car safe to ride, it is cut off from the train. At about 11:15 p.m. plaintiff rode a coal hopper off the hump to its destination in the yard. He was conveyed back to the hump on a dilly, or pick-up car, which he rode with three or four other brakemen. When he reached the hump he walked in the lead toward track No. 1, upon which a train just in from







the mountains was being classified over the hump. Plaintiff testified that the conductor, from his position in the tower, hollered to him, plaintiff, "Get on that car," indicating the leading car which was then moving but still attached to the train. Plaintiff testified that he caught the car at the side ladder at the trailing end and that he slipped as he was getting on the stirrup, and that after he had climbed up the side ladder about three steps the car on which he was climbing was cut off from the train. It started to drift down the hump by gravity. Plaintiff stated that he climbed up the side of the ladder to the top of the car, and that the side ladder of iron construction had 16 to 18 rounds. He found that the car had no brake platform. It then became necessary for him to control the movement of the car by operating its handbrake from the roof of the car. He testified that the ladder going up was slippery and covered with ice and that when he reached the top he noticed that the roof was covered with ice and snow. As there was no brake platform on which to stand in operating the handbrake, he sat down on the roof to operate the brake. He was then facing toward the west. He stated that the roof was covered with dirty crusted snow to a depth of 3 inches and that there were footprints in the snow indicating that someone had previously walked over the catwalk of the car.

The handbrake of a car has a dog or ratchet, which is a gear engaging device located on the brake platform to prevent the brake from unwinding. It is operated by the foot of the brakeman while winding the brakewheel by hand. As this car had no platform the ratchet was on the roof of the car about 2 feet below the handwheel. Plaintiff had a brake







club about 3 feet long, which he used to wind the brake with one hand while engaging the dog or ratchet with the other hand. Brakemen riding a car are customarily allowed to reach the brake platform and try the handbrake before being cut off and if the car is for any reason unsafe, it is customary to stop the train on his signal and cut off the car coupled with a safe car behind it, allowing the brakeman to take the unsafe car to its destination by means of the handbrake of the second or safe car. A yard engine then picks up the second car if it does not belong on the same track with the unsafe one. On other occasions the unsafe car is pushed onto the slide track on the top of the hump by means of the crossover track and is not allowed to be ridden down.

Plaintiff testified that before he could reach the roof, try his handbrake and see if the car was otherwise safe to ride, his car was cut off from the train and started to drift down the hump by gravity; that he had given no signal that he was prepared to be cut off; that the car went down the hump at about 15 or 20 miles per hour; that he rode the car about 40 car lengths, or 2,000 feet; that he stopped it at its destination in a place where it was very dark; that he had no lantern to illuminate his way in the darkness in getting off the car; and that he, being 6 feet 3 inches tall, had to crawl on his hands and knees over the ice and snow on the roof to the side ladder to get off. He testified that as he placed his foot in the top rung of the side ladder and tried to secure a hold on the grab iron located on the roof of the car about 16 inches from the edge, he was carrying his 3 foot long brake club and that his frame was in a crouched position; that he was unable to obtain a hold on the roof grab iron as







there was 3 inches of icy snow all around it; that this grab iron normally is elevated 2 inches over the roof; that the top rungs of the side ladder were likewise covered with ice; that suddenly plaintiff's feet slipped off the ice and, being unable to grab the roof grab iron, he fell to the ground about 15 feet below, landing in a sitting position on his left hand and right hip. There was testimony that his left hand and right hip felt broken and that he was intermittently unconscious. He was assisted to the hump, where a statement was taken from him as to the occurrence. He was taken to a hospital where his hand was repeatedly casted. He underwent two operations which removed a number of bones from his left hand, leaving him with a wrist that at the time of the trial two years after the occurrence had, according to evidence introduced, very little motion or sensation, caused him constant pain, prevented him from lifting anything, and had deep scars knitted to the underlying tendons. There was evidence that he sustained a serious back injury, about which he never complained due to the constant pain in his wrist. When plaintiff gave his statement immediately following the occurrence he said nothing about snow or ice being on top of the car or on the rungs of the ladder. About 12 days after the occurrence he signed another statement in which he attributed his mishap to the snow and ice on the car.

The car upon which plaintiff rode and from which he fell had been picked up at Vandergrift at 1:25 a.m. and arrived at Altoona at 9:20 p.m. Vandergrift is situated about 350 miles east of Pittsburgh. There was no evidence to indicate that snow had fallen on the train as it proceeded westward to Altoona. Immediately following the occurrence an







inspection of the car was made by defendant's car inspectors T. S. Norris and P. E. Denning. The witness Norris testified that a complete inspection of the car was made. His report showed that there was no snow or ice on the roof. Mr. Denning, who accompanied Norris, did not climb to the top of the car but did examine the ladders on the sides of the car. He stated that there was no ice or snow on them. The car which plaintiff rode down the hump just before getting on the box car was free of snow and ice. Defendant introduced testimony to show that the entire yard was well lighted so that the roof and sides of the cars were brightly illuminated, as were other objects in the yard. Defendant asserts, from this testimony, that plaintiff could have seen any snow or ice on the rungs of the ladder before he got onto the stirrup. Defendant also introduced testimony that there were flood lights in the middle of the incline of the hump and another battery of flood lights two car lengths of the west bridge; that three flood lights were situated on the bridge directly east of the classification yards; and that on the top of the tower there were six 1,000 watt lamps. Plaintiff states that the power of these lamps was illustrated by the witness Makin, who said that the head lamp of a locomotive consumes only 250 watts. Plaintiff stated that, so far as he knew, the flood lights were all burning in the yard at the time of the occurrence. The conductor, Chatham, denied that he directed him to get on the car. He stated that he did not see him get on the car, but that plaintiff was on the car when it passed him, Chatham, at the cut off point.

Plaintiff urges that the trial court should have granted his motion for a new trial because it erred in excluding, on his case in chief, evidence of defendant's violation

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of custom and practice which was admissible to prove common law negligence without being alleged in the complaint. It does not argue that the judgment is against the manifest weight of the evidence, nor does it argue that defendant was negligent in using a car of the design and structure of the one from which he fell. No such argument could be made as the design and structure of the car conform to the requirements of the Interstate Commerce Commission. Plaintiff states that in the following instances, because of objections of defense counsel which were sustained, he was unable to introduce evidence to prove these allegations of his complaint:

"He was unable to show that plaintiff had previously climbed cars and found them unsafe to ride. This evidence was offered for purpose of showing that if a car was unsafe the plaintiff would signal the conductor or pin puller that he had an unsafe car. The conductor would then stop the hump and allow the rider to get off the unsafe car which would then be placed on the slide track and taken down by an engine or it would be cut off and coupled to a safe car with the brakeman riding the latter. He was unable to show how many cars a brakeman rides off the hump at one time. This evidence was offered for the purpose of laying a foundation to prove that when the first car is unsafe the brakeman dismounts and climbs the second car and the two cars are then cut off and allowed to go down the hump coupled together with the brakeman controlling the two cars by operating the hand brake from the brake platform of the second car. He was unable to show that cars with a brake platform have a dog or ratchet on the platform operated by the foot of the brakeman as he stands on the platform. This evidence was offered to show the ease with which the hand brake is operated on a box car with a brake platform as contrasted with a platformless car requiring the engaging of the dog by hand. The evidence would tend to prove that the railroad should have anticipated that a brakeman would be injured in riding an icy platformless box car, the dog of which was on the roof and had to be operated with one hand, while the brakeman turned the handwheel with the other by means of a three foot long brake club. He was unable to show that plaintiff was not furnished with a lantern or flashlight to light his way in getting off the roof of the car in the darkness. He was unable to show that it is customary







for a brakeman to give a signal that he is ready to have his car cut off from the train. He was unable to show that when a car is unsafe for any reason it is placed on the slide track on top of the hump and is not allowed to be ridden down but is taken down by means of an engine. He was unable to show that when a car rider deems a car unsafe he can board the car next behind it and ride the two down together by riding on the brake platform of the second and safer car. He was unable to show that there was a yard engine in the east end of the yard to switch out the safe car if it did not belong on the same track where it had taken the unsafe car. He was unable to show the nature and purpose of a footboard or brake platform. This evidence was offered to show the ease with which the position required to operate a hand brake could be reached and left on a box car having a brake platform as contrasted with a box car having no such platform and required a brakeman to operate the hand brake from the roof. It would further show that a platformless car is an extraordinary hazardous car when it is covered with ice and snow. He was unable to show how a brakeman gets onto a brake platform to operate the handbrake. This evidence was offered for purpose of showing the safety of operating a handbrake on a car having a brake platform and how by contrast the ice and snow on a platformless car makes the latter dangerous and hazardous to ride. He was unable to show that there was no sand or ashes provided on the hump to place on the tops of icy and slippery cars and brake platforms. This evidence was offered for purpose of showing the utter disregard defendant had for the safety of its car riders. He was unable to show which ladder, the end ladder or side ladder, is customarily used by hump riders in getting off the tops of the car after riding the car to its destination. This evidence was offered for purpose of showing that plaintiff in using the side ladder in dismounting was in the exercise of due care for his own safety and was obeying the rules of the company."

To a large extent the offers of proof by plaintiff cover the same subject matter. Plaintiff states that they represent the crucial point in his case in that failure to follow the established custom set him adrift on a car covered with ice and snow and without a brake platform which he could have climbed down with safety and ease when the car came to a stop, with the result that the jury was allowed to consider only a portion of defendant's conduct instead of the whole of it in determining whether plaintiff had proved negligence as the cause "in whole or in part" of his injuries.







Defendant answers this argument by insisting that the court did not err in excluding several offers of proof made by plaintiff, because (a) the facts proposed to be shown were without relevancy and therefore incompetent as evidence; (b) the offer sought to prove the witness's opinion or conclusion that the car was unsafe; and (c) even though it be assumed that the offer of proof was a proper offer to prove relevant facts by competent evidence, nevertheless, plaintiff was not prejudiced because the custom or practice sought to be proved was fully shown by the uncontradicted testimony of defendant's witnesses, J. W. Chatham and J. E. Makin. Answering the last proposition (c) plaintiff says that the error is not cured when the evidence is elicited by plaintiff's counsel on cross-examination of defendant's witnesses after plaintiff has rested his case. Plaintiff supports his position by citing Bibbins v. City of Chicago, 193 Ill. 359; Wallach v. Manhattan Elevated Railway Co., et al., 94 N. Y. S. 574, 576; Reynolds v. Tucker and Wife, 6 Ohio, 516, and other cases. On this proposition defendant cites Eames v. Rend et al., 105 Ill. 506; Bressler v. Beach et al., 21 Ill. App. 423; Stewart's Adm. v. L. & N. R. R. Co., 136 Ky. 717; Phinney v. Detroit United Ry. Co., 232 Mich. 399, and other cases. An examination of the authorities discloses that where the issues are contested on the proof, the exclusion of cumulative or corroborative evidence cannot be cured by its subsequent reception. If, however, the fact be not disputed, the court's initial rejection of the evidence is corrected by later proof of the undisputed fact irrespective of the identity of the witness by whose testimony it is proved.







In Stewart's Admr. v. L. & N. R. R. Co., 136 Ky., 717, plaintiff sought to recover damages caused by the death of Tinsley Stewart, a brakeman employed by defendant. Upon a second trial there was a verdict and judgment for \$3,500. Among the errors relied upon by plaintiff, who appealed, were certain rulings of the trial judge excluding evidence offered by plaintiff. The court said (720):

"The court refused to permit G. A. Stewart to testify that at the place where the track gave way the old roadbed was lower than the new that was put in. While the court did refuse to allow the plaintiff to prove this in chief, the fact was proved on cross-examination of other witnesses, and was uncontroverted. \* \* \*

The court refused to permit the plaintiff to prove by John Matlock that the section crew had been working on the track, but quit it eight days before, and had not returned until after the wreck. But all the facts were brought out on the cross-examination of the witnesses for the defendant, and there was no dispute that the section hands had not been there for eight days. The evidence of Matlock, if admitted, could have had no effect on the result. The court refused to permit Allen Minor to testify that the train at the time of the wreck was running faster than trains usually run. In making this ruling, the court followed the opinion on the former appeal. The court refused to permit Boyle Robertson to state that for a mile and a half before the train reached the place of the wreck it was running down grade. But when the defendant introduced its evidence, the plaintiff proved this fact by the engineer, conductor and fireman on cross-examination, and there was no contrary evidence given, so that the fact as to the grade of the track was clearly established before the jury."

The custom or practice which plaintiff proposed to prove came into the record on the uncontradicted testimony of defendant's witnesses Chatham and Makin. On the trial and in the proof the custom in its whole scope, operation and effect was admitted. Nothing occurred in the presence of the jury that would suggest to the jury that the court considered proof of the custom not to be proper. Nor did anything happen by way of argument or colloquy to suggest







that the existence of the custom was in any way questioned; There was no controversy as to the existence of the custom. The jury could not have escaped believing that which the defendant freely and unqualifiedly admitted. Without at this time considering the contentions of the parties as to the initial exclusion of the proffered testimony, we are of the opinion that the subsequent admission of such proffered testimony cured the error, if any.

The excluded evidence was subsequently brought before the jury on cross-examination of defendant's witnesses. Plaintiff was not allowed to bring out the proffered evidence on direct examination or on cross-examination. Plaintiff states that the error of excluding his evidence cannot be considered cured by subsequent admission because all of the wrongfully withheld evidence never did reach the jury. We are of the opinion that substantially all of the excluded evidence was later presented to the jury. This is shown by plaintiff's statement of the facts contained in his briefs.

Plaintiff maintains that he was prejudiced by the exclusion because of the order of reception of the excluded evidence. We have read the cases cited by plaintiff in support of this proposition. In our opinion the cited cases are not applicable to the facts of the instant case where the custom which plaintiff wished to prove, in the first instance, was not disputed either in the pleadings or at the trial. It is our opinion that plaintiff was not prejudiced because of the order of reception of the excluded evidence.

Plaintiff argued that the court committed reversible error in refusing to give, at his request, the following instruction:







"If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew, or should have known, that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from a preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the condition of said car by reason of the presence of the snow and ice, if any, was such that a reasonably prudent person in the position of said conductor would not have ordered plaintiff to go upon the car, and if you further find from a preponderance or greater weight of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider this together with all of the facts and circumstances proved by a preponderance of the evidence by arriving at your verdict."

Plaintiff states that it is negligence to order an employee into a known unsafe place to work, regardless of whether such dangerous place is caused by actual negligence of the defendant or by climatic conditions; that as the conductor was in a superior position from his location in the tower to see and appreciate the hazard of the snow and ice on the platformless car which he ordered plaintiff to mount and ride, the plaintiff had a right to direct these facts to the attention of the jury so that they could determine whether the conductor was negligent in giving this order; that unless the jury were instructed that in determining whether the defendant was negligent they had a right to consider whether the snow and ice on the roof of the box car made the car hazardous to ride and whether this was known by the conductor when he ordered plaintiff thereon, the jury would not know that the defendant could be liable for ordering an employee into a place made unsafe by climatic conditions; that a fortuitous snowstorm on the day preceding the final argument







to the jury gave defense counsel a weighty and subtle argument which he used to great advantage; and that the jury, without the benefit of an instruction from the judge, could and was easily led to believe that conditions of snow and ice were acts of God for which a railroad could not be liable irrespective of the circumstances.

In support of his argument that the court erred in refusing to give the instruction, plaintiff cites Chicago Union Traction Co. v. Browdy, 206 Ill. 615; Halloran v. Chicago & Northwestern Ry. Co., 327 Ill. App. 217, 63 N. E. (2d) 670; C. R. I. & P. Ry. Co. v. Cline, 91 Colo. 255, 14 P. (2d) 495; Texas & P. Ry. Co. v. Presley, 152 S. W. (2d) 1105; Grannon v. Donk Bros. Coal & Coke Co., 259 Ill. 350; Vandalia Ry. Co. v. Kendall, 68 Ind. App. 1, 119 N. E. 817; Williams v. Terminal Ry. Assn. 20 S. W. (2d) 584; Clark v. Union Iron & Foundry Co., 234 Mo. 436, 137 S. W. 577; Berry v. B. & O. Ry. Co., 43 S. W. (2d) 782; and State ex rel. v. Ellison, 283 Mo. 532. The factual situations in the cases cited are such that in our opinion the cases are not applicable to the factual situations presented by the record before us. In Baltimore & Ohio R. Co. v. Berry, 286 U. S., 272, the Supreme Court of the United States reversed the judgment for plaintiff which had been affirmed by the Supreme Court of Missouri, (Berry v. Baltimore & Ohio R. Co., 43 S. W. (2d) 782) for want of any evidence in the record tending to show negligence on the part of the defendant. In so reversing our Federal court said (274):

"The state supreme court held that under the instructions given by the trial court, the jury, in order to return a verdict for respondent, was required to find that the petitioner was negligent both in stopping the caboose on the trestle and in directing or permitting the respondent







to alight there. It held, rightly, that there was no evidence that the petitioner was negligent in stopping the train where it did, but as it concluded that petitioner negligently directed or permitted respondent to alight at that point, it upheld the verdict as necessarily involving a finding of such negligence on the part of the conductor.

"There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and, as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence, there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by respondent. The conductor did not ask respondent to alight from the caboose rather than from one of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at the point chosen. There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight."

The uncontradicted testimony of witnesses who described the physical situation at the apex of the hump was that the area was well lighted. On the basis of this evidence plaintiff insists that defendant's conductor saw, or in the exercise of reasonable care, could have seen the top of the car and have known that it was covered with snow and ice. Plaintiff testified that when he got onto the box car it was still attached to the train, but that it was cut off by the pin man before he reached the top of the car. He noticed that the stirrup was slippery from ice and that there was ice on the rungs of the car ladder. If it be assumed that the conductor detected, or could have detected, the presence of ice and snow on the car which made it dangerous, then plaintiff, who was much closer to the car and whose attention had been specifically directed to the stirrup and rungs of the car ladder, had an equal if not superior opportunity to know the condition of the car with respect



The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are based on the principle of the conservation of energy. The second part of the paper is devoted to a discussion of the experimental results of the study of the structure of the atom. It is shown that the experimental results are in good agreement with the theoretical predictions of the theory of the structure of the atom.

The third part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of matter. It is shown that the theory of the structure of the atom can be used to calculate the properties of matter, and that the calculated properties are in good agreement with the experimental results. The fourth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the nucleus. It is shown that the theory of the structure of the atom can be used to calculate the properties of the nucleus, and that the calculated properties are in good agreement with the experimental results.



to snow and ice. If plaintiff possessed equal knowledge or equal opportunity for knowledge with the conductor, then under the Berry v. Baltimore & Ohio case it was not an act of negligence for the conductor to tell plaintiff to get on and ride the car.

The instruction was properly refused on the further ground that there was no evidence which tended to show that the command or direction given by defendant's conductor to plaintiff to get up on the box car proximately contributed to cause his injuries. Plaintiff testified that the conductor told him to get on the car. This he did in the usual manner and without incident. He got on the car without injury. He ascended to the top of the car and set the brakes as the car moved onto the track to which it had been routed. He coupled the box car to another car standing on the track before undertaking to get off. He did not explain why he did not go from the top of the car on which he rode to the top of the car to which it was coupled so that in getting off the car he might avoid the ice which he stated he encountered in ascending to the top of the box car. Plaintiff performed without injury all that the conductor directed him to do. There were no other facts or events that could be considered along with the order of the conductor in determining whether or not the evidence as a whole tended to prove that the order given was the proximate cause of plaintiff's injuries. There is no evidence to show that any circumstances or occurrences operated to cause plaintiff's injuries other than the ice on the grab iron and rungs. It is not contended by plaintiff that the presence of ice and snow is in and of itself any factual basis to support a jury's finding of







negligence. Nor has plaintiff alleged or attempted to prove or argue that it was the duty of the defendant to remove the ice and snow from the car. Looking at the facts in the light most favorable to plaintiff they show a direction to get on a car, which plaintiff did without trouble. Since the presence of the ice and snow was not negligence and since the original direction of the conductor did not embrace his descent in the manner in which he elected to descend, it cannot be said that the record contains any evidence which tends to show that the command given proximately contributed to cause plaintiff's injuries. We are of the opinion that under the evidence presented the court properly refused to give the instruction.

For the reasons stated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.



the 1990s, the number of people in the world who are under 15 years of age is expected to increase by 1.5 billion, from 1.1 billion in 1990 to 2.6 billion in 2010. The number of people aged 15 and over is expected to increase by 1.5 billion, from 3.5 billion in 1990 to 5.0 billion in 2010. The total population of the world is expected to increase by 3.1 billion, from 4.6 billion in 1990 to 7.7 billion in 2010. The population of the world is expected to be 7.7 billion in 2010, with 2.6 billion under 15 years of age and 5.0 billion aged 15 and over.



44558

ROSARIO GALLO,

Appellant,

v.

BALTIMORE AND OHIO CHICAGO TERMINAL  
RAILROAD COMPANY and NORTH WESTERN  
RAILWAY COMPANY,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

336 I.A. 309

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The original complaint was in one count and sought to recover damages against the B. & O. C. T. R. R. Co. under the Federal Employers' Liability Act. The amended complaint realleged the first count against that railroad in Count I. Count II realleged that action against that railroad and charged the C. & N. W. Ry. Co. with negligence as owners and operators of the locomotive which struck plaintiff. Count III realleged the allegations in Counts I and II and charged that the concurrent negligence of both railroads caused the plaintiff's injuries. Defendants made issue of the various allegations and averred that the plaintiff's negligence was the sole cause of his injuries. The C. & N. W. Ry. denied that as to it, plaintiff was entitled to the benefit of the Employers' Liability Act. At the close of plaintiff's case the court directed a verdict in favor of the B. & O. C. T. It overruled the C. & N. W.'s motion for a directed verdict. The C. & N. W. Ry. offered no evidence. The court submitted the case of common law negligence against the C. & N. W. to the jury. The verdict was not guilty. The court denied plaintiff's motion for a new trial and entered judgment on the verdict. We granted plaintiff's petition for leave to appeal within one year.







Plaintiff was a section hand employed by the B. & O. C. T. He had worked in that capacity for that road since 1941. On June 20, 1945, his crew supervised by a foreman began to work at 7 A. M. They were engaged in unloading rails from a B. & O. C. T. work train in the vicinity of 38th Street and Archer Avenue in Chicago. The rails were to be used to reconstruct a main line of the B. & O. C. T.

The railroad right of way in that vicinity runs generally north and south. On the east side there are three tracks of the Chicago Junction Ry.. To the west of these are two tracks of the B. & O. C. T.. West of these are three tracks of the Pennsylvania Railroad. About a block north of the point where plaintiff's crew was working, the Chicago & Alton R. R. tracks, also elevated, cross the north-south right of way in an east-west direction. The distance between the westernmost Junction Railroad track and the easternmost B. & O. C. T. track is about 8 feet 6 inches. The overhang of the ordinary freight or passenger car is 18 or 20 inches.

The B. & O. tracks are main line tracks, used by passenger trains going from, and coming into, Illinois. The work train from which plaintiff's crew was unloading the rails was stationed on the easternmost B. & O. C. T. track. This was the northbound main. About 9:30 A. M. the work train moved away to the south off the north main, to about 39th Street to make way for a northbound passenger train. Foreman Krueger and other members of plaintiff's crew stayed on the work train. Plaintiff and another member of the crew remained where they had been working. The northbound train passed and thereafter plaintiff was standing between the rails of the westernmost Junction Railroad track. His







co-worker had, meanwhile, walked east and across the tracks to a tool shed. At this time an engine owned by the C. & N. W. was pulling a couple of cars south on the rails between which plaintiff was standing. It stopped north of the Alton crossover. It was signaled across and proceeded south. It attained a speed of about 6 miles per hour. The switch tender in a shanty south of the Alton crossover and between the B. & O. C. T. and Pennsylvania tracks observed plaintiff's situation with the locomotive moving toward him. He ran from the shanty and shouted to the engineer. Until this time, neither the engineer nor the fireman had seen plaintiff. Plaintiff had looked north after stepping between the rails and had seen the locomotive north of the Alton crossover. He then looked south toward the work train and did not again look north.

About the time the engineer's attention was called to the switch tender, the fireman saw plaintiff when the engine was about "5 or 10 feet in front of the engine." He also shouted to the engineer and the engineer stopped the train. It struck plaintiff before stopping. His back was badly injured as a result. The switch tender testified he heard no whistle except a blast, which annoyed him, when the locomotive was stopped north of the Alton crossover. The fireman testified two blasts were blown before they started across the crossing. Both of these witnesses testified that the bell on the engine was ringing as it traveled south to cross the Alton crossover. Plaintiff said he heard no whistle or bell. A long freight train was going north on the next track east as the C. & N. W. engine approached plaintiff. The day was clear and visibility good. The accident occurred about 100 feet south of the crossover. The tracks north of this point commenced to curve to the southeast. The engineer







for this reason could not see very well on the track ahead. His view was limited to about a car length. The fireman could see 100 feet down the track until after the engine passed the crossover, then his view was limited to about 25 feet.

Plaintiff claims benefit of the Federal Employers Liability Act as to both defendants, as employee of the B. & O. C. T. and because the C. & N. W. locomotive was operated on the Junction tracks used jointly by both defendants. He bases his charge of negligence against the B. & O. C. T. on its alleged failure to provide him a safe place to work; the failure to warn him of the approach of the locomotive and failure to protect him from movement of approaching trains. The charges against the C. & N. W. are that it negligently operated the locomotive, operated it at excessive speed, failed to warn plaintiff and failed to keep a proper lookout for persons on the track. It is claimed that plaintiff was entitled to a jury trial of the issues against the B. & O. C. T. Reliance is placed upon Bailey v. Railroad, 319 U. S. 350. There the court held that there was sufficient evidence of the railroad's negligence to go to the jury. The trial court in the case before us held that there was no evidence tending to prove negligence on the part of the B. & O. C. T. It is clear from the evidence that the place where plaintiff was injured was not a place furnished by the B. & O. C. T. for his work. There is no evidence upon which it can be fairly stated that the B. & O. C. T. had a duty to warn plaintiff of the approach of the locomotive owned by another railroad and being operated on the tracks of a third railroad. The place of work between the Junction and B. & O. C. T. right of way where plaintiff was left when the work train moved away was safe. Had plaintiff remained there he would not.







have been injured as he was. There is no evidence of any other train movement against which defendant had any duty to protect plaintiff. We are convinced that the trial court properly directed the verdict for the B. & O. C. T. ✓

We see no reason in either Bailey v. Railroad or Lavender v. Kurn, 327 U. S. 645, for holding that the court erred in refusing to admit in evidence rules of the B. & O. C. T. These rules pertained to the duty of foreman to place themselves in position to protect their workmen from approaching trains. The trial court considered the rules inapplicable to the factual situation in this case. We think the trial court was right. The foreman was in no position, nor could he have placed himself in position on the work train to know anything of plaintiff's precarious position, to warn plaintiff. He was under no obligation to remain with plaintiff when the work train moved away. When the foreman left plaintiff, the latter was in no need of protection or warning.

Plaintiff contends the court erred in refusing to admit evidence offered to show a relationship of lessor and lessee between the Junction and the C. & N. W. He says that proof of this relationship would bring his suit against the C. & N. W. under the Employers' Liability Act by virtue of the ruling in Armstrong v. Railroad, 350 Ill. 426. (Certiorari denied 289 U. S. 724.) It is his view that he was prejudiced since under the case submitted to the jury, the question of contributory negligence was a "complete defense" whereas, under the Federal Act that defense would not be involved except in reduction of damages. There is no claim that the verdict was against the manifest weight of the evidence. The evidence excluded was offered to show "joint user" by







defendant of the Junction Railroad, not a lease. It was excluded on objection of the attorney for the B. & O. C. T. There was no objection by the attorney for the C. & N. W. There was no attempt by plaintiff to have the evidence admitted as to the C. & N. W. alone. There was no denial by the C. & N. W. that it used the Junction tracks.

Plaintiff's given instruction No. 1 included the requirement of due care on the part of plaintiff. He cannot very well complain of the result which he, himself, brought about.

In any event the Armstrong case would not apply to the situation which plaintiff constructs in his brief. It is sufficient to distinguish the Armstrong case to point out that plaintiff here was not the employee of the C. & N. W.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J. AND BEWE, J. CONCUR.







44542

ARTHUR J. FREER,

Appellee,

v.

ORR REALTY COMPANY and  
WILLARD ORR,

Appellants.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

336 I.A. 310

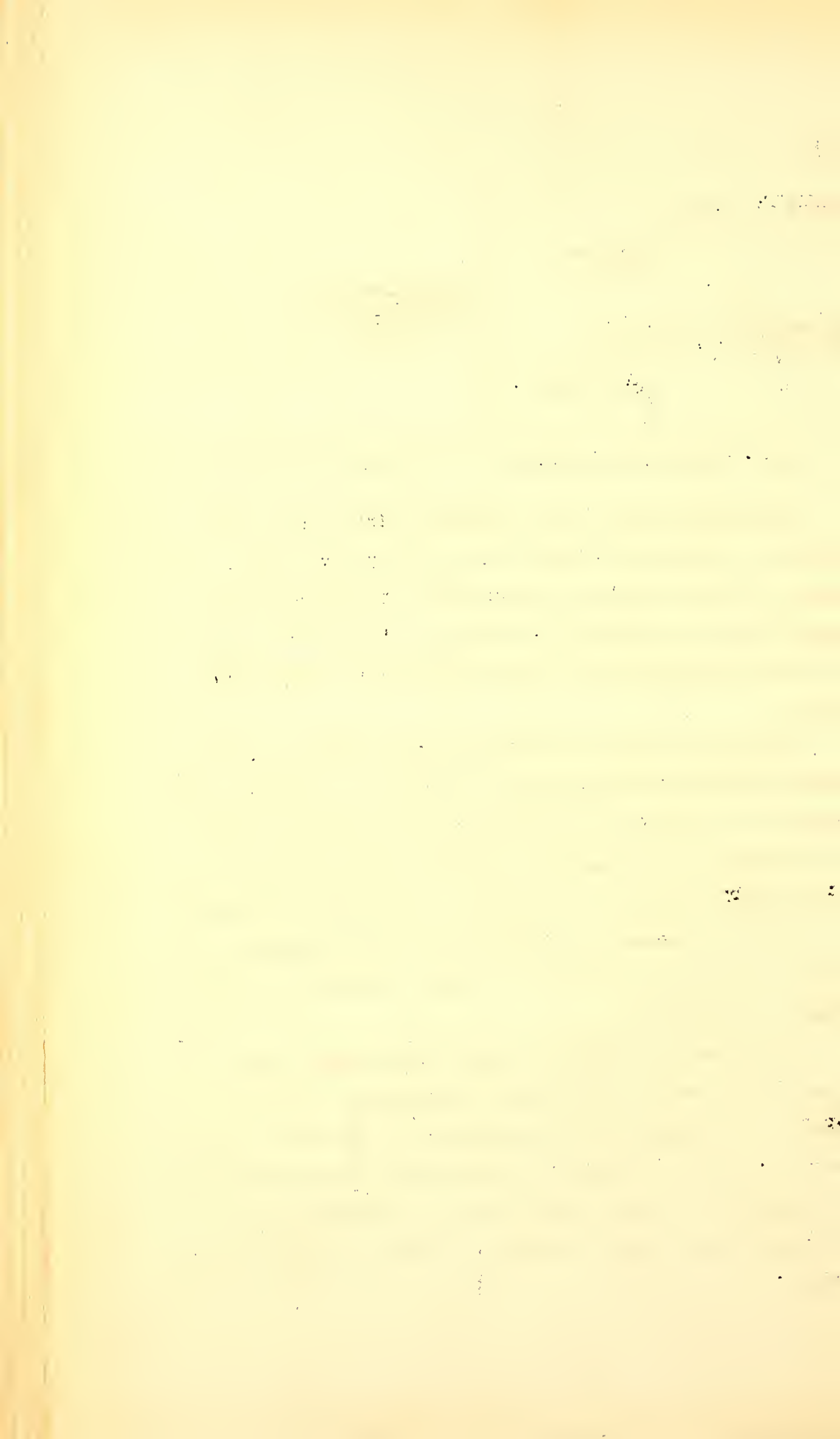
MR. JUSTICE LEVE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment in the sum of \$425 entered on a directed verdict of the jury given at the close of all the evidence in an action to recover a real estate broker's commission. Defendants' motions for judgment notwithstanding the verdict and for a new trial were denied.

The material facts are uncontroverted. March 1, 1940 defendant Willard Orr agreed to pay plaintiff one-half of any commissions received by defendants for the sale of a house to one Ashbach the prospective purchaser whose name was furnished by plaintiff to defendants. In May 1943 defendants sold a house to Ashbach for \$17,000 for which defendants received a broker's commission of \$850, one-half of which is claimed by plaintiff.

The statement of claim alleged in paragraph 1 that plaintiff is a real estate broker duly licensed by the Department of Registration and Education of the State of Illinois. In their defense defendants aver that plaintiff is not licensed as a real estate broker as provided by the ordinances of the City of Chicago. No reply was filed to the defense.







2.

The basic question presented is whether plaintiff can maintain his action for a real estate broker's commission without being licensed under the ordinance of the City of Chicago. According to plaintiff's testimony he was in the real estate business in Chicago for eleven or twelve years. Moreover, so far as the record shows he makes no contention that the sale of real estate here involved is an isolated transaction. Inasmuch as plaintiff admits that he was engaged as a real estate broker at the time of the transaction here involved, there can be no recovery, because of his failure to prove that he had a license in the City of Chicago. (O'Neill v. Sinclair, 153 Ill. 525; Ross v. New South Farm & Home Co., 191 Ill. App. 353.)

For the reasons stated, the judgment is reversed.

JUDGMENT REVERSED.

BURKE, P. J., and KILEY., concur.







44562

WALTER C. DURLAK,

Appellee,

v.

SUN CHEMICAL CORPORATION, a  
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3361.A.310<sup>2</sup>

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$315 entered on the finding of the court in an action for an alleged breach of employment contract.

The essential facts are uncontroverted. Effective May 1, 1946, defendant issued an interoffice communication to its employees relating to vacation salary, the pertinent provisions of which are as follows:

"2. Employees with over ten (10) years of continuous service shall be granted one (1) additional day vacation for each year over ten (10) years to the maximum of fifteen vacation days.

"3. The vacation period shall start on June 1st, and vacations may be taken anytime within one (1) year thereafter, but may not accumulate from year to year.

"5. Employees whose services with the company are terminated on or after June 1st and who have not received their earned vacation allowance shall be entitled to vacation pay determined by the number of months of continuous service prior to June 1st,  
\* \* \*."

April 30, 1947 plaintiff, who had been in the employ of defendant continuously for a period of sixteen years, wrote a letter to defendant which reads as follows:



1970-1971

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"April 30th, 1947  
Chicago, Ill.

" Dear Mr. Barmeier:

"It is with sincere regret I am informing you that I plan on resigning June 1st, 1947.

"I want you to know that my sixteen years with the Sun Corporation have been beneficial and pleasant. I regret that I have to leave my associates and I wish to thank you and all the other splendid people for making my job easier.

"I want you to know that writing this letter has been a very difficult task, however, this opportunity may provide fulfillment of a lifelong ambition.

"I know that I leave with your sincere wishes for success.

"Please be assured of my complete cooperation with anyone whom you may send to the laboratory to relieve me.

Sincerely yours  
(Signed) Walter C. Durlak"

May 2, 1947 defendant replied as follows:

"May 2, 1947

"Mr. Walter Durlak  
Sun Chemical Corporation  
6556 South Melvina Ave.,  
Chicago 38, Illinois

"Dear Walter:

"I am in receipt of your letter of April 30, tendering your resignation to become effective June 1st. Needless to say I am very sorry to see you leave the corporation.

"I want to take this opportunity to extend to you my best wishes for success in your new venture. If, at anytime, I can be of any assistance to you, please feel free to call upon me.

Kind regards,  
(Signed) F. E. Barmeier"

FEB:IB

Plaintiff was paid monthly. He had received his full salary for the month of May 1947 and according to his testimony worked until noon on May 31, 1947. It is not disputed that plaintiff was employed continuously for the whole year preceding and including the month of May 1947.







Defendant contends that since plaintiff's employment was from month to month it could only be terminated at the end of the month. Defendant argues that plaintiff performed no services in the month of June 1947; that his resignation was tendered and accepted effective at the end of the month. We think this position is untenable. Defendant's letter accepting plaintiff's resignation states that the resignation is "to become effective June 1st." The word "effective" has been construed to mean "in actual operation." (Krause v. Henry, 35 N. E. (2d) 169, C. A. Ohio.) If plaintiff's resignation became effective on June 1, 1947, then his contractual obligation to render service to defendant ended on that day. In our opinion plaintiff's contract of employment was terminated by mutual agreement of the parties on June 1st, and therefore he became entitled to vacation pay under the provisions of paragraph 5 of the interoffice correspondence.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.







44140

MOLLIE LAFFER,  
Appellee,

v.

HARTFORD FIRE INSURANCE  
COMPANY,

Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

336 I.A. 311

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree that ordered the reformation of a fire insurance policy. Mollie Laffer, a nominal plaintiff, brings this suit for the benefit of Benjamin H. Black and Arthur H. Beermann, who compose the law firm of Black and Beermann. She is employed in their office and her sole interest in the suit is whatever Black and Beermann may "determine to give her." On April 28, 1942, defendant executed a contract of insurance insuring Benjamin H. Black, Administrator of <sup>the</sup> Estate of Louise Thompson, Dec'd, from loss by fire occurring upon the premises known as 9341 South Perry avenue, Chicago, Illinois. A fire occurred there on January 8, 1943, and the adjusters agreed that the damages to the two buildings upon the premises were \$1,450.40. This suit was commenced in December, 1943, as an action at law. The complaint, briefly stated, alleged the issuance of the policy; that the Administrator at the time of his appointment was informed and believed that the said decedent at the time of her death was the owner of the premises in question and, relying upon said information, he, as Administrator, directed one Harold J. McElhinny, an agent of defendant, to check the title and issue a fire insurance policy to him as Administrator; that said agent delivered to Black,



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Administrator, the policy in question; that after the delivery the Administrator discovered that the real estate covered by the policy was not owned by decedent at the time of her death but was held in joint tenancy with her divorced husband, William Thompson, who survived her and thereby became the owner of the premises, and the real estate did not become a part of decedent's estate; that the premises were owned by Harriet R. Blumenthal, who was the grantee of Thompson in a deed made by him after the death of the decedent; that "at the request of the said owner," the Administrator, on May 5, 1942, assigned the policy to her by executing the form of assignment appearing upon the policy; that on that date said agent of defendant knew and was informed of the aforesaid facts and the policy was delivered to him as said agent on said date, and said agent stated that on behalf of defendant he consented to the assignment and gave his receipt to said Administrator for the policy; that about January 8, 1943, while the policy was still in the possession of defendant through said agent and while it was still in full force and effect, the property was destroyed by fire, whereby said Blumenthal sustained loss and damage in the sum of \$1,450.40; that on December 18, 1943, said Blumenthal assigned her entire interest in the policy, including the proceeds of the policy due her by reason of the fire, to plaintiff, Mollie Laffer, who is the bona fide owner of the chose in action forming the subject matter of the suit by reason of that assignment. On October 15, 1945, the action at law was abandoned and upon motion of plain-







tiff the cause was transferred to the chancery division of the court and plaintiff was permitted to file an "amended complaint in chancery," which seeks to reform the insurance policy by changing the name of the insured therein from Benjamin H. Black, Administrator of the Estate of Louise Thompson, Dec'd, to that of Harriet R. Blumenthal. Said complaint alleges, inter alia, that after the delivery of the policy of insurance to Benjamin H. Black, as Administrator of the Estate of Louise Thompson, Deceased, and after the said Administrator discovered that the real estate was owned by the divorced husband of the decedent, Black approached said McElhinny for the purpose of having him, as defendant's agent, issue a fire insurance policy covering the said premises in behalf of Harriet R. Blumenthal; that McElhinny stated to Black that it would be cheaper and more expedient to change the name of the insured in the policy from Benjamin H. Black, Administrator, to that of Harriet R. Blumenthal, and that he, as agent of defendant, would consent to such change; that McElhinny instructed Black to execute the assignment provision appearing in the policy, and stated that the insured in the policy would be changed from Black, Administrator of the Estate of Louise Thompson, Dec'd, to Harriet R. Blumenthal; that Black then executed the assignment and delivered the policy to McElhinny for the purpose of having the latter make the said change; that on January 8, 1943, while the policy was still in the possession of said agent, the property was destroyed by fire and said







Blumenthal sustained loss and damage to said property in the sum of \$1,450.40. The said complaint prays that defendant be compelled by a decree of the court to reform the policy of insurance so that it will contain the name of Harriet R. Blumenthal instead of that of Benjamin H. Black, Administrator of the Estate of Louise Thompson, Dec'd, in accordance with the agreement of its agent, McElhinny.

When the cause came on for trial upon plaintiff's amended complaint the chancellor of his own volition called a jury and submitted to it for determination a single question, viz., whether or not the defendant agreed to insure the property in question in the name of Harriet R. Blumenthal. The jury returned a verdict finding "that the defendant did agree to insure Harriet R. Blumenthal as to the property in question," and the chancellor decided to follow the verdict of the jury and entered the following decree:

"\* \* \* this cause coming on again to be heard upon the plaintiff's amended complaint, the defendant's answer thereto and the replies of plaintiff and upon the verdict of a jury herein to whom was submitted the issue as to whether or not the defendant agreed to insure the property in question in the name of Harriet R. Blumenthal, and upon the evidence received and heard in open court before the court and the said jury:

"And the court \* \* \* FINDS:

"\* \* \*

"2. That the material allegations in plaintiff's







amended complaint are true and that the equities in this cause are with the plaintiff.

"3. That on April 28, 1942 the defendant, by Harold J. McElhinny, its duly authorized agent, made, executed and delivered to Benjamin H. Black, as Administrator of the Estate of Louise Thompson, Deceased, a policy of insurance in writing \* \* \* whereby defendant, among other things, insured the building on the property located at 9341 South Perry Avenue, Chicago, Illinois, against loss or damage from fire.

"4. That on May 5, 1942 the defendant, by the said Harold J. McElhinny, its duly authorized agent, agreed to change the name of the insured in said policy to Harriet R. Blumenthal against loss or damage resulting to the said property from fire.

"5. That on May 5, 1942 the said Harriet R. Blumenthal was the legal owner of the property and premises \* \* \* and continued to be such owner until after the building was damaged by fire as hereinafter set forth.

"6. That on January 8, 1943 the building \* \* \* was damaged by fire and the amount and value of such damage was \$1450.41.

"7. That proof of loss was made to defendant on March 9, 1943, within the time required by the defendant's contract of insurance, and that under the facts such proof of loss fulfills all the requirements of such contract.

"8. That subsequent to the loss and damage by fire \* \* \* Harriet R. Blumenthal assigned her accrued claim under the defendant's contract of insurance to







plaintiff.

"9. That plaintiff is entitled to have the written contract executed by defendant reformed by naming Harriet R. Blumenthal as the insured herein, instead of Benjamin H. Black, as Administrator of the Estate of Louise Thompson, Deceased, and is entitled to recover against defendant by decree entered herein the principal sum of \$1450.41, together with interest thereon at 5% per annum from May 9, 1943 amounting to the sum of \$273.08, making a total of \$1723.49.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"A. That the policy of insurance made, executed and delivered by defendant on April 28, 1942 \* \* \* be and the same is hereby reformed as of May 5, 1942 by substituting Harriet R. Blumenthal as the insured thereunder in lieu of Benjamin H. Black, as Administrator of the Estate of Louise Thompson, Deceased, and the name of 'Benjamin H. Black, as Administrator of the Estate of Louise Thompson, Deceased,' is deleted from said policy wherever it appears and the name 'Harriet R. Blumenthal' is hereby substituted therefor.

"B. That the plaintiff do \* \* \* recover \* \* \* from the defendant the sum of One Thousand Seven Hundred Twenty-Three Dollars and Forty-Nine Cents (\$1723.49), together with her costs of suit, and that execution issue therefor."

Louise Thompson, the divorced wife of William H. Thompson, died in February, 1942, and Benjamin H. Black was appointed Administrator of her estate. Black testified that after he was appointed he called Harold J.







McElhinny, an agent of defendant, to his office and told him that he was informed that the only asset in the estate of Louise Thompson was a small piece of property on the south side, gave him the address of the property, and said, "Will you check the title and see if it is in her name, because if it isn't in her name at the time of her death, and it is the only asset, I don't want to be administrator of an estate where there are no assets"; that McElhinny said, "I will check the title and let you know"; that McElhinny thereafter said, "Louise Thompson died owning that property"; that Black then stated to McElhinny, "Get the value and issue an insurance policy," and McElhinny said that he would do so, and thereafter McElhinny gave him the policy; that he subsequently learned that Louise Thompson had no interest in the property at the time of her death; that she owned it in joint tenancy with her husband; that they were divorced and the divorce decree did not in any way change the ownership of the property and therefore he knew as a lawyer that the survivor became vested with the title to the property.

To sustain the instant decretal order plaintiff relies upon the oral agreement set up in the amended complaint in chancery and the testimony of Black as to the agreement. Black testified that on May 5, 1942, he told McElhinny that Thompson had sold the property to Harriet Blumenthal and that he represented her and had an interest in the property; that McElhinny should issue a new policy to her, cancel the old policy, and return the unearned premium to him; that McElhinny said that instead of can-







selling the old policy it would be cheaper if he (McElhinny) "would take the old policy and merely change the name from Benjamin H. Black, as Administrator to the new owner, Harriet Blumenthal"; that he told McElhinny that if he thought it would be cheaper and the best way of doing it to go ahead and do it, "so I gave him the policy and he gave me a receipt" for it, dated May 5, 1942; that he handed the policy to McElhinny for the purpose of changing the name of the insured from that of Benjamin H. Black as Administrator to that of Harriet Blumenthal, the owner; that the change was never made on the policy and that when the fire occurred on January 8, 1943, he reported the loss to McElhinny "and then asked him about taking care of the adjustments on the fire"; that McElhinny then "came in and told me that he had the policy in his possession, but that he neglected to have it changed on the face of the policy. He said he had forgotten about doing exactly that, and that it was in his office, and he found it there, but he said it would be O.K., that the company would honor it, and in which he acted as their agent." Black further testified that on May 5, 1942, when he told McElhinny to cancel the policy and return the unearned premium to him and issue a new policy to Harriet R. Blumenthal, McElhinny stated that "it would be cheaper to just assign the old policy to Harriet Blumenthal, and he directed me to sign on the form that is attached to the policy, and I executed that form on the insurance policy, assigning the policy to Harriet







Blumenthal." The receipt that McElhinny gave Black for the policy recites that the policy "will be assigned to the new owner." There is nothing in the testimony of Black to show that between May 5, 1942, and January 8, 1943, the date of the fire, he held any conversation with McElhinny as to the oral agreement or that McElhinny's failure to return the policy was ever mentioned by either of them. Black further testified that after the fire he made the proof of loss, on March 6, 1943, and signed it as "Benjamin H. Black, Administrator of the Estate of Louise Thompson." The sworn statement in the proof of loss contains the following:

"By your policy of insurance above described, you insured Benjamin H. Black, Administrator of the Estate of Louise Thompson (hereinafter called Insured) \* \* \*. When your policy was issued - or if assigned with your consent, when such assignment was made and consented to - Insured was the sole, absolute and unconditional owner of the property described (and if a building, of the land on which it stood) and no other person or persons had any interest, lien or incumbrance therein or thereon, nor has there been any change in the title, use, occupation, location, possession or exposure of said property, except Title to the property is now vested in Harriet Blumenthal," (Italics ours.)

The certificate of the notary public attached to the proof of loss contains the following: "Personally appeared before me, the day and date above written Benjamin H.







Black, Administrator of the Estate of Louise Thompson signer(s) of the foregoing statement who made solemn oath to the truth of the same and that no material fact is withheld of which the Insurer should be advised." The proof of loss was inclosed in a letter from Black's adjuster to defendant's adjuster, in which Black's adjuster stated:

"We enclose proof of loss executed by Benjamin H. Black, covering claim for loss by fire to property situated 9341 Perry Ave., Chicago, Illinois.

"Loss and damage was sustained on January 8, 1943, and was insured under policy No. 1257259, expiring April 28, 1943.

"This proof is being filed in order to comply with the policy conditions."

Black testified that he made the foregoing proof of loss at the direction of McElhinny. No other proof of loss was made to defendant. The only claim made to defendant as a result of the fire was the one made by Benjamin H. Black, Administrator of the Estate of Louise Thompson. Although his claim recited that when the policy was issued he "was the sole, absolute and unconditional owner of the property described \* \* \* and no other person or persons had any interest, lien or incumbrance therein or thereon," it is admitted that Black, Administrator of the Estate of Louise Thompson, Deceased, had no interest in the real estate at the time the policy was issued. Although Black testified that on May 5, 1942, he assigned the policy to Harriet R. Blumenthal, there is no mention







of this assignment in the foregoing proof of loss. The first knowledge that defendant had that Harriet R. Blumenthal claimed to have an interest in the policy - save the alleged notice to McElhinny - was when the summons was served in the instant suit. In the assignment form attached to the policy there appears what purports to be an assignment from Benjamin H. Black, Administrator of the Estate of Louise Thompson, Deceased, to Harriet R. Blumenthal of his interest in the policy, but neither McElhinny nor anyone representing defendant signed the "Consent By Company To Assignment Of Interest" form also attached to the policy.

This brings us to a consideration of an important contention raised by defendant, viz., that plaintiff "failed to prove by evidence, clear, convincing, and beyond doubt, that she was entitled to have the contract in question reformed." In Ambarann Corp. v. Coal Corp., 395 Ill. 154, the court states (p. 166): "To reform an instrument upon the ground of mistake, the mistake must be of fact and not of law, mutual and common to both parties, and in existence at the time of the execution of the instrument, showing that at such time the parties intended to say a certain thing and, by a mistake, expressed another. Before a deed will be reformed, satisfactory evidence of mistake must be presented, and the evidence must leave no reasonable doubt as to the mutual intention of the parties, a mere preponderance of the evidence being insufficient. (Harley v. Magnolia Petroleum Co., 378 Ill. 19; Tope v. Tope, 370 Ill. 187.)" (Italics ours.) In Seery v. Catholic Order of Foresters, 176 Ill. App. 307, the court said (p. 309): "\* \* \* and the evidence







of mutuality in the mistake should relate to the time of its issuance, and show 'that at that particular time the parties intended to say a different thing and by mistake of fact expressed another.' Matthews v. Whitethorn, 220 Ill. 36." (See, also, Silurian Oil Co. v. Neal, 277 Ill. 45, 48.) Here it is not even contended that any mistake was made in drafting the policy, which was written in strict accordance with the parties' agreement and understanding at the time. As we analyze the testimony of Black the alleged oral agreement contemplated the making of a policy to Blumenthal by a most unusual method, described by McElhinny as a "cheaper" method. As Black testified, McElhinny stated that he would take the old policy and merely change the name from Benjamin H. Black as Administrator to the new owner, Harriet Blumenthal. Plaintiff's lawyers state that the substance of the transaction was that for the purpose of issuing a policy to Blumenthal the old policy was to be used, the name of Black as Administrator to be erased upon the old policy and the name of Blumenthal substituted; that Blumenthal, through Black, merely orders specific insurance from defendant through McElhinny. Black's testimony as to the alleged oral agreement does not make out a prima facie showing that would warrant the reformation of the policy ordered in the decree. But even if it could be assumed that Black's testimony made out a prima facie right to a reformation of the policy it would then be incumbent upon plaintiff to prove that right by the character of evidence required by the law. In Tope v. Tope, 370 Ill. 187, the court states (pp. 191, 192):







"The evidence required to reform a written instrument must leave no reasonable doubt as to the mutual intention of the parties. A preponderance of the evidence is not sufficient. The rule has been expressed in many ways. In all cases there should be satisfactory evidence before a deed will be reformed. (Nicoll v. Mason, 49 Ill. 358.) In Goltra v. Sanasack, 53 Ill. 456, the court says: 'The mistake must be satisfactorily established, and not inferred from loose, doubtful or unsatisfactory evidence.'

"Patterson v. Patterson, 251 Ill. 153, holds the facts upon which reformation may be granted should be so convincing as to leave no reasonable doubt in the mind of the court. And in Christ v. Rake, 287 Ill. 619, it is said: 'Where contracting parties have reduced their agreement to writing it is presumed to express their mutual intention, and that presumption does not yield to any claim of a different intention unless the evidence of a mutual mistake is of a strong and convincing character. A written instrument will not be reformed on the ground of mistake unless the evidence that it does not express the intention of the parties is such as will strike all minds alike as being unquestionable and free from reasonable doubt. The remedy of reformation on account of an alleged mistake is never granted upon a probability nor upon a mere preponderance of the evidence but only upon evidence amounting to a certainty.'

"It is clear, from an examination of the authorities, that a mistake which may be remedied by reformation must be one of fact, and must be common and mutual to both parties







to the instrument, and must exist at the time the instrument was prepared and executed, and not at a later time." (See, also, Ambarann Corp v. Coal Corp., supra, p. 166; Silurian Oil Co. v. Neal, supra, p. 48.)

The contention of defendant that in any event plaintiff failed to establish a right to the reformation of the policy as ordered in the decree by the degree of proof required by the law is clearly a meritorious one and it is sustained.

We do not deem it necessary to pass upon the contention of defendant that a period of eight months and three days elapsed between the time the alleged oral contract of insurance was made and the fire and that to validate such a contract would lay open the door for the perpetration of frauds upon insurance companies.

Defendant has raised and argued a number of other contentions, but in our view of this appeal it is only necessary for us to refer to one of them: It was necessary for plaintiff to prove that Harriet R. Blumenthal had an insurable interest in the premises. Plaintiff contends, "May 4, 1942 Blumenthal became the legal owner of the premises by quit claim deed from William H. Thompson and thereafter had an insurable interest therein." The alleged assignment of the policy to her by Black, Administrator of the Estate of Louise Thompson, Deceased, was made May 5, 1942. Defendant earnestly contends that Thompson did not sign the said quitclaim deed and was physically unable to do so. Elizabeth Calvin testified that Thompson lived at her home from 1941 to 1943; that







he was a Spanish-American war veteran and dependent upon a government pension for his support; that he was about 73 or 74 years old and had suffered three strokes; that finally she was unable to handle him and he was sent to Hines hospital, where he had been before; that during the last period of time that he lived at her home he never went out, and in the early days of May, 1942 (the quitclaim deed purports to have been signed on May 4, 1942), "he was just like a baby, helpless," and confined to his bed, and that the last time he was taken to the hospital it was necessary to carry him from her home on a stretcher; that he was taken to a Spanish-American war veterans' home in Danville in October, 1944, and died there in December, 1944; that when he first lived at her home he was able to endorse his pension checks if she directed his hand, but that after his second stroke he could not write his name, that she would write it and he would put a cross in front of the name; that he was not "crazy or anything like that, but he wasn't able to contract or transact business as a man should." Black testified that he directed McElhinny to buy the property from Thompson for him, and it is clear from the evidence that McElhinny dealt with Thompson in the matter of the deed of May 4, 1942, as he signed the acknowledgment to the deed as a notary public. That deed was a necessary part of plaintiff's case. The fact that Black directed McElhinny to buy the Thompson property for him, and that McElhinny, an agent of defendant, engaged in a scheme to build up a claim against his principal casts suspicion on







that deed, and also throws light upon the relationship that existed between McElhinny and Black at the time of the alleged oral agreement. As McElhinny did not testify and Thompson was deceased at the time of the trial, the record fails to show what, if anything, Thompson knew concerning the deed. McElhinny was familiar with the property that was insured. He placed an insurable value upon one of the buildings of \$3000 and \$1,500 upon the other. What, if anything, he paid Thompson for the deed is not clear. The quitclaim deed recites that the consideration for the deed was "Ten Dollars and other good and valuable considerations." Attorney Galloway testified that the amount that Thompson received at the time of the execution of the first deed was nominal. When defendant sought to inquire as to the actual consideration that was paid Thompson, the chancellor, erroneously, we think, sustained plaintiff's objection to the inquiry. While the grantee in the alleged deed was Harriet R. Blumenthal, it is conceded that she was a dummy titleholder for Black and Beermann. If the alleged transaction between Thompson and McElhinny was an honest one, why did McElhinny obtain the deed from the practically helpless Thompson for a nominal sum? Black conceded, in effect, that he was not willing to rely upon the deed of May 4, 1942, when he arranged with Attorney Galloway to obtain the reaffirmance deed. After the fire defendant's adjuster went to McElhinny's place of business at 118th street and Western avenue, where he found an old real estate office that was closed and no notice of any kind on the door. Defendant



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was unable to locate McElhinny until December, 1943, when it discovered that he was living in California. Black testified that McElhinny represented Black and Beermann as a real estate agent and real estate broker; that they bought and sold property through him; that McElhinny also wrote insurance for them; that "he was our general all around insurance broker and real estate broker. We had great faith in him. \* \* \* With regard to real estate matters I had implicit faith"; that "if he submitted anything to me I bought it," and that if he (Black) wanted to sell any real estate and McElhinny had a buyer he would sell it through McElhinny; that the law firm of Black and Beermann represented McElhinny in legal matters; that they represented him in his bankruptcy suit and filed an appearance for him in a personal injury suit. Black stated that he directed McElhinny to go ahead and buy the property from Thompson for him, but when Attorney Galloway called upon him and complained that advantage had been taken of Thompson he told Galloway that McElhinny was Thompson's broker. It is true that Attorney Galloway, called by plaintiff, testified that after the \$300 was paid he saw Thompson sign the reaffirmance deed from Thompson to Blumenthal and that he acknowledged the deed; that he saw Thompson sign his name as an endorsement upon the check; that he, Galloway, also endorsed the check; that at that time Thompson was not able to leave his home as he had had a stroke. Any title that Harriet R. Blumenthal







may have acquired to the property by the deed of May 4, 1942, was for the convenience of Black and Beermann, who paid whatever amount, if any, that was paid to Thompson. As no check was offered by plaintiff to show the consideration paid Thompson for the first deed it is reasonable to assume that whatever was paid was in cash. However, in view of our conclusion as to the alleged oral agreement, we do not deem it necessary to decide the question as to whether the deed of May 4, 1942, was a fraudulent one. We feel impelled to say, however, that if the case is retried defendant should not be unduly restricted in its inquiry as to the circumstances that surrounded the making of that deed.

The decretal judgment of the Circuit court of Cook county is reversed and as the decree was practically based upon the verdict of a jury we have concluded that the cause should be remanded for a new trial.

DECRETAL JUDGMENT REVERSED AND  
CAUSE REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.







FRANK KOBE, MILDRED DANEK, MATHIAS  
 KOBE, MARY ZUPANICH, ANNA MAYNARD,  
 MOLLY AYLER, LOUISE (ALOJZIJA)  
 JONES, IDA BROWN, and ROSIE BRUIN  
 (Plaintiffs) and FRANK H. KOBE,  
 Administrator of the Estate of  
 MATHIAS KOBE, Deceased (Intervening  
 Petitioner),

Appellees,

v.

JOSEPHINE KOBE HASKETT, COLONIAL  
 SAVINGS AND LOAN ASS'N, a Corp.,  
 and CHARLES DETRICK,  
 Defendants.

JOSEPHINE KOBE HASKETT,  
 Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

3381A. 311<sup>2</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

As this cause was tried upon the amended intervening petition as amended of Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, it is unnecessary to state certain pleadings that were filed by Frank Kobe, Mildred Danek, Mathias Kobe, Mary Zupancich, Anna Maynard, Molly Aylor, Louise (Alojzija) Jones, Ida Brown and Rosie Bruin and certain answers filed thereto. The verified amended intervening petition of Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, alleged:

"1. That he was on December 31, 1945, duly appointed administrator of the Estate of Mathias Kobe, deceased, by the Probate Court of Cook County, Illinois \* \* \*; that he duly qualified as said administrator and his appointment as such is now in full force and effect.

"2. \* \* \*

"3. That the said Mathias Kobe died at Chicago, Illinois December 19, 1945 at the age of eighty-six (86) years, leaving him surviving ten (10) children namely, Frank Kobe, Mildred Danek, Mathias Kobe, Mary Zupancich, Anna Maynard,



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the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

<sup>a</sup> The number of subjects who were included in each group was 10.

...and the fact that the *Journal* is a journal of the American Psychological Association, the largest and most influential organization in the field of psychology, adds to the journal's prestige and makes it a must-read for all psychologists.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.



Molly Aylor, Louise (Alojzija) Jones, Ida Brown, Rosie Bruin and Josephine Kobe Haskett, all of whom are adults; that all of said children are residents of Cook County, Illinois except the defendant, Josephine Kobe Haskett, who is a resident of the State of California.

"4. That the said Mathias Kobe, died seized in fee simple of improved real estate located at 3626 South Wallace Street, Chicago, Illinois, consisting of a six room cottage occupied by the deceased during his lifetime as his residence; that he left personal property consisting of his household furniture and personal effects of the total approximate value of not to exceed Two Hundred Dollars; that said deceased also was the sole owner of the sum of Three Thousand one hundred forty-seven Dollars and fifty-nine cents on deposit in savings account #813 with the defendant, Colonial Savings & Loan Association, a corporation, \* \* \* and that said amount was on deposit with said defendant at the time of the death of Mathias Kobe.

"5. That an inventory and claims have been filed in said estate and that the said estate is insolvent should your petitioner as administrator fail to secure possession of the said funds in the aforementioned savings account.

"6. That Mathias Kobe during his lifetime had a joint savings account in the said \* \* \* Association \* \* \* with his wife, Anna, who died on May 15, 1944; that all of the money in said account was the sole property of Mathias Kobe, having been received by him from the proceeds of the sale of a parcel of real estate located at 5217 South Carpenter Street, Chicago, Illinois, which proceeds amounted to about Forty-Five Hundred Dollars.

"7. That at his wife's death, the said Mathias Kobe was 85 years of age; that at said time and for a long period







of time prior thereto he was suffering from arthritis and in great physical pain, and was thereby rendered infirm, disabled and unable to leave his home without bodily assistance; that in addition thereto he was in deep mourning and grieving over the death of his wife whose loss caused him intense shock, both mentally and physically making him extremely melancholy and despondent; that Josephine Kobe Haskett who had left her home in California to attend the funeral of her mother, Anna Kobe, remained in the home of Mathias Kobe for two weeks thereafter, during all of which time he continued to suffer from the condition above described; that the defendant Josephine Kobe Haskett, knowing full well of her father's then mental and physical condition and being at all times mindful of the money on deposit in said account, was constantly alone with him in his house during the said two weeks and with ulterior motives for personal gain, she nursed, cared for and was in constant attendance upon him, thereby gaining his confidence and trust; that by the use of undue influence, domination and by making full use of the confidence he thereby reposed in her as a consequence of her conduct towards him, as aforesaid, she did then and there deliberately, for her own personal advantage, gain and with the intent of defrauding him, his estate, his heirs and creditors, represent to her father the said Mathias Kobe, that the savings account that he had in joint tenancy with his wife, \* \* \* in the \* \* \* Association \* \* \* be closed and that a new account be opened up in said savings association in the names of Mathias Kobe and Josephine Kobe Haskett, with right of survivorship; that she further represented, by so doing, in the event of his death, any expenses of administration would be avoided, and she would make distribution equally to his other children; that the said Mathias Kobe relying on







such representations and the trust and confidence he had in the defendant, did thereupon accede to her request and did open up such account as aforesaid; ~~that thereafter said Josephine Kobe Haskett did return to her home in California.~~

"8. That the initial deposit in account #813 was Four thousand four hundred seventy-seven dollars and ninety-three cents ; that withdrawals were made from said account by Mathias Kobe on fourteen different occasions during the period of June 1, 1944 to December 3, 1945, \* \* \* thereby reducing the amount on deposit including all dividends, at the time of his death to Three thousand one hundred forty-seven dollars and fifty-nine cents.

"9. That Mathias Kobe \* \* \* on \* \* \* the 25th day of December 1944 did make, declare and publish his last Will and Testament a copy of which is hereto attached and made a part hereof and marked Exhinit 'A'; that he did by said Will devise and bequeath all of his real and personal property to each of his ten children including the defendant herein, all of which facts are more clearly set forth in the copy of said Will hereto attached as Exhibit 'A.'

"10. That at the time said Will was executed Mathias Kobe had no other money except that on deposit in said account #813 in the \* \* \* Association; that he never made a gift of the funds in said account to defendant, Josephine Kobe Haskett, but on the contrary, said money at all times remained the property of Mathias Kobe: that the pass book of said account has always remained in possession of Mathias Kobe until his death and is now in the possession of the petitioner.

"11. That Josephine Kobe Haskett, did, on the death of Mathias Kobe, her father, attend his funeral and immediately thereafter on December 26, 1945, attempt to withdraw







all of the money on deposit in said savings account and would have succeeded in doing so save for the issuance of the injunction by this Honorable Court in this cause on December 29, 1945, on the complaint filed herein by the nine plaintiffs, who are the brothers and sisters of the defendant, Josephine Kobe Haskett.

"12. That thereafter the defendant, Josephine Kobe Haskett, returned to her home in California where she now resides.

"13. That the temporary injunction heretofore issued out of this court ought to be made permanent for the reason that irreparable injury will result to the estate of Mathias Kobe, Deceased.

"14. That for the reasons above set forth, the money in possession of the defendant, \* \* \* Association, in the amount of \$3147.59, is the rightful property of the Estate of Mathias Kobe, deceased and should be ordered by this Court to be delivered to your petitioner, Frank H. Kobe, as administrator of the Estate of Mathias Kobe, deceased, for the benefit of said estate and distributed by the Probate Court of Cook County, in accordance with the provisions of said Will marked Exhibit 'A'.

"15. That your petitioner \* \* \* has no adequate remedy at law save in a Court of Equity.

"16. That this Honorable Court has full and complete jurisdiction of all of the parties hereto and the subject matter hereof.

"Wherefore, your petitioner prays:

"A. That he be given leave to file this petition and intervene as an additional party plaintiff to this cause and that this petition be allowed to stand as an answer to the







bill of complaint filed herein.

"B. That all parties to this cause may be ordered to answer this petition within a reasonable time to be fixed by the Court.

"C. That all orders heretofore entered by this Court and all writs heretofore issued out of this Court in this cause, be allowed to remain in full force and effect for and on behalf of your petitioner.

"D. That the injunction heretofore issued be made permanent.

"E. That the sum of \$3147.59 or any other amount in possession of the Colonial Savings and Loan Association, a corporation, that is or was on deposit in the savings account of Mathias Kobe, account #813, be paid to Frank H. Kobe, as administrator of the Estate of Mathias Kobe, deceased, for the benefit of the Estate of Mathias Kobe, deceased, now pending in the Probate Court of Cook County, Illinois.

"F. And for such other and further relief in the premises as equity may require and to the Court may seem meet."

Attached to said petition was a copy of the last will and testament of Mathias Kobe, deceased, the essential parts of which read as follows:

"After the payment of such debts, expenses of administration and funeral expenses, I give, devise and bequeath to my beloved children, Frank, Mathias, Mary, Anna, Molly, Alojzija, Ida, Rosie, Milly and Josephine all my interest in real estate. In case of the death of my said children prior to my death, leaving living child or children, his or her surviving, then such surviving child or children shall take such share to which his or her parent or parents would have become







entitled, it being my intention that my property shall descend per stirpes and not per capita.

"I give, devise and bequeath all the rest, residue and remainder of the personal and real property of which I may die seized or possessed, including lapsed and void legacies and devises, and also all of the real and personal property to which I may hereafter become entitled, to my beloved children, Frank, Mathias, Mary, Anna, Molly, Alojzija, Ida, Rose, Milly and Josephine, share and share alike. However, qualifying the above that my children, Alojzija, Rosie, Millie and Josephine to have One Hundred Dollars (\$100.00) in addition to their share.

"In case of the death of any of my said children prior to my death leaving child or children, him or her surviving, then such surviving child or children shall take such share to which his or her parent or parents would have become entitled, it being my intention that my property shall descend per stirpes and not per capita.

"I hereby direct that my said executor in carrying out the terms of this My Last Will and Testament, collect the sum of Seven Hundred Dollars (\$700.00) from the Chicago Baecker Understuetzungs Verein, to which my estate may become entitled at my death and to expend out of said sum the sum of One Hundred Dollars (\$100.00) to be used for the purpose of having masses said for the repose of my soul, said masses to be celebrated at St. Stephen's Church, 1852 W. 22nd Place, Chicago, Illinois, and the balance of Six Hundred Dollars (\$600.00) for the necessary funeral expenses in connection with my burial.

"I hereby make, constitute and appoint John Jerich, of the City of Chicago, County of Cook, State of Illinois,







Executor of this my last Will and Testament and direct that he may be allowed to act as such without bond.

"\* \* \*

"It is my will that if any of my heirs or devisees contest this will or endeavor to have it declared void or of no effect, that such heir or heirs, devisee or devisees, shall take nothing from my estate, either real or personal, and that the share of share of such contesting or moving party of parties shall descend to the other of my heirs or heir refusing to join such contest, share and share alike, or in the event of his or her or their death, to his or her or their children per stirpes and not per capita."

Thereafter the following verified amendment to the amended intervening petition was filed:

"7A. That the defendant, Josephine Kobe Haskett did, on or about December 28, 1945, receive from the defendant, Colonial Savings and Loan Association, a corporation two checks for the total amount of \$3,147.59 payable to her order, which checks closed out the said account of Mathias Kobe; that she thereupon left Chicago, proceeding to her home in California; that thereafter on December, 29, 1945, in accordance with a Writ of Injunction issued out of this cause by



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this Honorable Court, the Colonial Savings and Loan Association stopped payment on said checks and said funds are now in the actual possession of the Colonial Savings and Loan Association; that the defendant, Josephine Kobe Haskett, never intended to and will not now, make distribution of said money in equal shares to her brothers and sisters in accordance with her representations to Mathias Kobe during his lifetime as charged in the Amended Intervening Petition; that said Josephine Kobe Haskett has heretofore filed her sworn answer to the complaint and alleges therein as follows:

"'6. (a) Defendant, Josephine Kobe Haskett admits she is a resident of the State of California and withdrew the funds in said joint Savings Account No. 813 in the Colonial Savings and Loan Association, a corporation, upon the presentation to said Association of an Inheritance Tax Waiver and a Surety Bond to provide for payment of said Colonial Savings and Loan Association, a corporation, in the event such account was not paid to the proper party, a copy of which surety bond, marked Exhibit "B," is attached to this Answer and Made a part hereof.'

"'9. That she denies payment of said joint savings account No. 813, should be directed to be paid to the Administrator of the Estate of Mathias Kobe, deceased, but alleges that the present injunction should be dissolved and payment of said account made as provided by the agreement made relative to same, to-wit, Exhibit "A".'

"That by said sworn answer, Josephine Kobe Haskett claims the said money as her own property and asks payment be made to her as the joint survivor."

Thereafter defendant Josephine Kobe Haskett (hereinafter called appellant) filed the following verified answer:







"1. That on the 6th day of May 1946, a hearing was had on Proof of Will of Mathias Kobe and Letters of Administration with the Will annexed was issued to Frank H. Kobe.

"2. That she admits the allegations of paragraph three of said Intervening Petition.

"3. That she admits that her father, Mathias Kobe, died seized in fee simple of improved real estate located at 3626 South Wallace Street, Chicago, Illinois, consisting of a six room cottage occupied by the deceased during his lifetime as his residence; that she has no knowledge as to the complete amount of personal property or value of same left by said deceased; that she denies that the said deceased was the sole owner of the sum of \$3,147.59 on deposit in Savings Account #813 with the Colonial Savings and Loan Association; but alleges that the sum of \$3,107.99 on deposit in said Savings Account #813 was the joint property, under a contract of joint account, of Mathias Kobe or Josephine Kobe Haskett, as joint tenants with the right of survivorship, a photostatic copy of which application and agreement of deposit marked as Exhibit 'A' is attached hereto and made a part hereof.

"4. That she has no knowledge sufficient to form a belief of the facts alleged in paragraph 5 of said Amended Intervening Petition and therefore neither admits nor denies same.

"5. That she has no knowledge sufficient to form a belief of the fact that all of the money in the account as alleged in paragraph 6 of said Amended Intervening Petition was received by Mathias Kobe from the proceeds of the sale of a parcel of real estate as alleged therein and therefore neither admits nor denies same.

"6. That she denies the allegations in paragraph 7 of



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said Amended Intervening Petition, except that she admits that Mathias Kobe was 85 years of age, that she left her home in California to attend the funeral of her mother, Anna Kobe, and that she returned to her home in California a few weeks after her mother's death.

"7. That she denies that she made any representations to Mathias Kobe, during his lifetime, to distribute the funds of said account in equal shares to her brothers and sisters as alleged in paragraph 7 and 7 A of said Amended Intervening Petition and its amendments thereto; and she further denies that she ever represented or agreed to anyone to distribute the money in said account to anyone in any manner; but Josephine Kobe Haskett alleges that Mathias Kobe and his daughter, Josephine Kobe Haskett, and the Colonial Savings and Loan Association, a corporation, executed said application and created said account #813 for the purposes set forth in said agreement, it being Mathias Kobe's further intention and desire that his daughter, Josephine, receive the total amount remaining in said account #813 on his death for her sole and complete ownership and use.

"8. That she admits the allegations in paragraph 8 of said Amended Intervening Petition and further states that at the time of Mathias Kobe's death the balance of said account #813 was \$3,107.99.

"9. That she has no knowledge sufficient to form a belief of the facts alleged in paragraph 9 of said Amended Intervening Petition, and therefore neither admits nor denies same.

"10. That she does not know whether her father, Mathias Kobe, had money other than that on deposit in said







account #813 at the time of the execution of said Will; that she admits that Mathias Kobe always had the pass book of said account in his possession until his death, but alleges that the funds in said account #813 were deposited under contract agreement of joint account of Mathias Kobe or Josephine Kobe Haskett, as joint tenants with the right of survivorship, and its ownership, possession and disposition was and is governed by said application and agreement, a copy of which is marked Exhibit 'A' and attached hereto and made a part hereof.

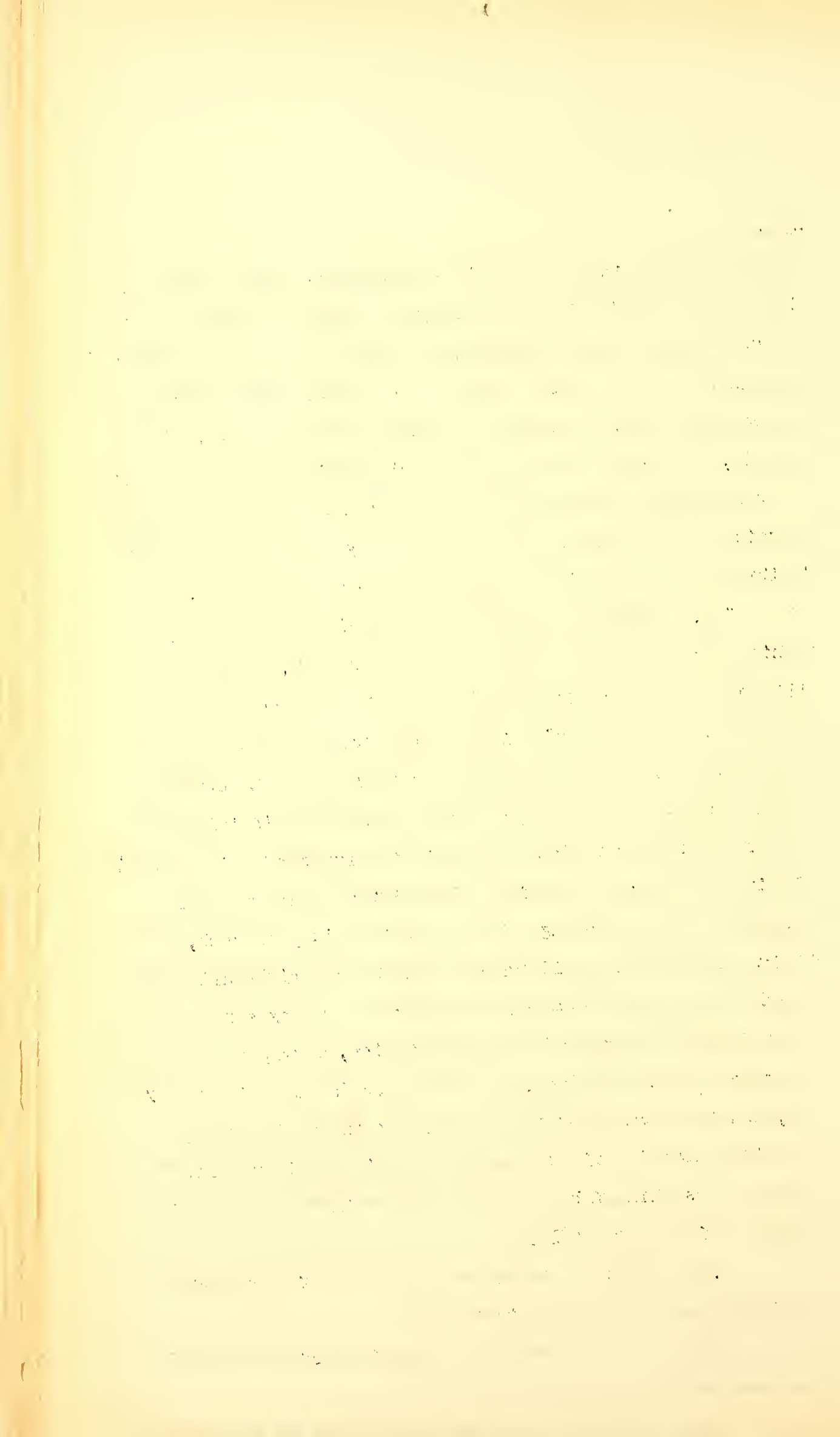
"11. That she attended the funeral of her father, Mathias Kobe, on the 24th day of December 1945. That after diligent search and inquiry she was unable to obtain possession of the pass book of said savings account #813, or information as to the whereabouts of same whereby she could obtain its possession and present same to the Colonial Savings and Loan Association and obtain the funds of said account #813 in accordance with said application and agreement of deposit. Thus, not being able to obtain said pass book, to obtain possession of said funds which she was rightfully entitled to, Josephine Kobe Haskett placed a surety bond with said Colonial Savings and Loan Association, a corporation, to indemnify said Association. Upon the placing of said Surety Bond, and the signing of the necessary withdrawal papers, the said Colonial Savings and Loan Association issued its checks to Josephine Kobe Haskett representing the total of funds of said account #813.

"12. That she admits the allegations of paragraph 12 of said Amended Intervening Petition.

"13. That she denies the allegations of paragraph 14 of said Amended Intervening Petition.

"14. That she denies the allegations of paragraph 15







of said Amended Intervening Petition.

"15. That she denies the allegations of paragraph 16 of said Amended Intervening Petition.

"Wherefore Josephine Kobe Haskett, Defendant Prays:

"That the Amended Intervening Petition of Frank H. Kobe, as Administrator with the Will annexed, and its Amendments thereto, be dismissed.

"That the Court order Henry Sonnenschein, as Clerk of the Superior Court of Cook County, Illinois, pay the sum of \$3,107.99, now on deposit in his possession, to Josephine Kobe Haskett.

"That the Court Order said Plaintiffs, in the Complaint, Intervening Petition and Amendments thereto, to pay Josephine Kobe Haskett, such damages, charges, expenses, costs and attorneys' fees as were caused to her and necessarily incurred by her by reason of the filing of said Complaint, Intervening Petition and amendments thereto, and the issuance of injunction and dissolution of same.

"And for any and such other relief in the premises as equity may require and to the Court may seem meet and proper."

Attached to the answer is Exhibit "A", the joint account in question.

After a hearing of the evidence the chancellor entered the following decree:

"This cause coming on to be heard upon the Amended Intervening Petition and Amendment thereto, of Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, and the Answers of the defendants, Josephine Kobe Haskett, Colonial Savings & Loan Association, and Charles Detrick, and the proofs, oral, documentary and written, taken and filed in said cause, after arguments by counsel for the







respective parties, the Court being fully advised in the premises, and after a full and complete hearing: Doth Find:

"That the Court has jurisdiction of the subject matter of this cause and the parties thereto.

"That the defendant, Colonial Savings & Loan Association has heretofore on the 11th day of March, 1947, pursuant to the Order of this Court entered herein on May 20, 1946, deposited the sum of \$3,107.99 with Henry Sonnenschein, the Clerk of the Superior Court of Cook County, Illinois,

"That the said defendants, Colonial Savings & Loan Association and Charles Detrick have no further interest in this cause.

"That the equities of this cause are with the intervening petitioner, Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, and against the defendant, Josephine Kobe Haskett, and that the said Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, is entitled to the relief as prayed for.

"It Is Therefore Ordered \* \* \* that the defendants, Colonial Savings & Loan Association and Charles Detrick, be and they are hereby dismissed as parties defendant to this cause.

"It Is Further Ordered \* \* \* that the intervening petitioner, Frank H. Kobe, as Administrator of the Estate of Mathias Kobe, Deceased, is rightfully entitled to the sum of \$3,107.99 heretofore deposited by the Colonial Savings & Loan Association with \* \* \* Clerk of the Superior Court of Cook County, Illinois, on March 11, 1947, pursuant to the Order of this Court heretofore entered in this cause on May 20, 1946, and the said \* \* \* Clerk<sup>\* \* \*</sup> be and he is hereby ordered and directed to pay to Frank H. Kobe, as Administrator of the







the entry of this Decree the sum of \$3,107.99.

"It Is Further Ordered \* \* \* that the defendant, Josephine Kobe Haskett, pay to Frank H. Kobe, as Administrator \* \* \*, the costs of this proceeding to be taxed by the Clerk of this Court and that he may have execution therefor.

"It Is Further Ordered, Adjudged and Decreed that the motion of the defendant, Josephine Kobe Haskett, for the assessment of damages, by reason of the issuance of the injunction in this cause and the dissolution of same, be and the same is hereby denied."

Appellant contends that the intervening petitioner failed to establish by competent proof the allegations of his amended intervening petition as amended and that the chancellor erred in entering the decree in question. Briefly stated, the theory of fact of petitioner set up in his amended intervening petition is that Mathias Kobe at the time of his wife's death was 85 years of age and for a long period of time had been suffering from arthritis, was in great physical pain and was thereby rendered infirm, disabled and unable to leave his home without bodily assistance; that he was grieving over the death of his wife, which caused him intense mental and physical shock; that appellant well knew her father's mental and physical condition and with ulterior motives for personal gain she nursed and cared for her father and was in constant attendance upon him, thereby gaining his confidence and trust; that by the use of undue influence, and because of the confidence he reposed in her, she "deliberately, for her own personal advantage, gain and with the intent of defrauding him, his estate, his heirs and creditors, represented to her father \* \* \* that the







savings account that he had in joint tenancy with his wife \* \* \* in the Colonial Savings and Loan Association, a corporation, be closed and that a new account be opened up in said savings association in the names of Mathias Kobe and Josephine Kobe Haskett, with right of survivorship; that she further represented by so doing, in the event of his death, any expenses of administration would be avoided, and she would make distribution equally to his other children; that the said Mathias Kobe relying on such representations and the trust and confidence he had in the defendant, did thereupon accede to her request and did open up such account as aforesaid." The said pleading does not allege that Mathias Kobe did not understand the nature and legal effect of the joint account at the time it was executed.

The chancellor, in deciding the cause, delivered an opinion in which he stated that he would not be justified in finding any fraud and that "I don't hold that there was any fraud," and the decree does not find that there was any fraud in connection with the execution of the joint account. The chancellor also stated in his opinion: "Now it does seem from this will, which, as I said, was subsequent to the opening of this joint account, that when this will was made that the testator was of the opinion that the money in that joint account was his and subject to his disposal." Otherwise, with no other funds, so far as the evidence disclosed, available than the money in this account in question, why should he have enumerated the specific bequest to each of his ten children, giving, however, to four of them an additional \$100.00 each? Here is a situation where there are ten children. One of the ten children claims that by virtue of having conveyed to her by her father an interest in the







account, which under the law other things of itself would give her the right of survivorship and, therefore, the sole right to the account in the event of the death of the deceased, but where the deceased subsequent to the opening of such account made this will, it does seem to me in the opinion of the Court that this joint account was a matter of convenience and that the intent of the testator was that and that he did, as I have heretofore stated, feel that this money in the bank was subject to his disposal and that he attempted to dispose of it as set forth in his will, and that that intention should be carried out." The will was not executed until December 25, 1944, which was about six months after the execution of the joint account. Appellant claimed the fund in question as the survivor of the joint account. Although the joint account is not even mentioned in the will the chancellor disposed of appellant's claim in the following manner: That Kobe at the time he executed the will was of the opinion "that this money in the bank" was his and "subject to his disposal," and that "that intention should be carried out." Even if the language of the will justified the conclusion of the chancellor that Kobe at the time of its execution was of the opinion that the money in the bank was his and subject to his disposal, that fact, alone, would not be sufficient to invalidate the joint account, which was not admitted in evidence until Charles F. Dietrich, president of the Colonial Savings and Loan Association, who drafted it, testified that he drafted the joint account at the request and direction of Mathias Kobe and that the latter did not sign it until he, Dietrich, had explained to him the nature and purpose of a joint account. There is certainly no direct evidence in the record that







Kobe did not understand the nature and purpose of the joint account at the time he signed it. Indeed, as we have heretofore stated, the petition alleges that appellant requested her father to sign the joint account and that he did so because of false statements and promises made by her. The chancellor forgot that if there was no fraud connected with the making of the joint account appellant, upon the death of her father, acquired a vested interest in the account. In view of the fact that this cause will probably be tried again we deem it advisable to express no opinion upon the question as to whether or not there was any evidence in the record to support the charge of petitioner that appellant was guilty of fraud in the matter of the execution of the joint account, and in this connection it should be noted that we are holding that the chancellor erred in sustaining an objection of appellant to certain evidence offered by petitioner.

Appellant contends, as we understand it, that the chancellor erred in admitting the testimony of petitioner in reference to a conversation that he had with appellant in the undertaker's place right after the death of Mathias Kobe. The testimony was offered in support of the allegations in the petition as amended that appellant was guilty of fraudulent conduct that caused her father to join in the execution of the joint account. The objection made to the offered evidence was that it tended to change the written contract and was therefore inadmissible. There was no merit in the objection. Appellant cites cases like Illinois Tr. & Sav. Bank v. VanVlack, 310 Ill. 185, in support of her objection. In that case there was no question of fact in-







volved and no charge of fraud or duress. The court was called upon to pass upon the purpose and effect of the written joint account agreement. We hold that the administrator was a competent witness. (See I. C. R. R. Co. v. Reardon, 157 Ill. 372, 378; Barnes v. Earle, 275 Ill. 381, 383.)

Petitioner has filed cross-errors as to certain rulings of the chancellor and we will refer to the more important ones. It is contended that the joint account agreement does not comply with Section 255f of Chapter 32, Ill. Rev. Stats., in reference to Building, Loan and Homestead Associations and that therefore a resulting trust arose, but as this contention was not raised in the trial court it is not necessary for us to pass upon it.

Petitioner next contends that the chancellor erred in permitting appellant's witness Charles F. Dietrich to testify, over the objection of petitioner, to the execution of the joint account, as he was an incompetent witness under the statute. There is no merit in this contention. Dietrich was made a codefendant by the plaintiffs in the original complaint solely because he was president of the Colonial Savings and Loan Association, and the only relief sought against him and defendant Association was injunctive in its nature. Dietrich and the Association filed an answer in the nature of an interpleader in which they denied any interest in the fund held by the Association and stated that "they are willing to turn over the said moneys under appropriate orders of the court." Thereafter the sum held by the Association was deposited by it with the clerk of the court. Dietrich had nothing to gain or to lose by the outcome of the cause and was not an incompetent witness under Section 2 of the Evidence Act.







Petitioner also contends that the chancellor erred in ruling upon the competency of two witnesses called by petitioner, Anna Maynard and Mathias Kobe. Appellant objected to the testimony of Mrs. Maynard upon the ground that she was a daughter of Mathias Kobe, had a direct interest in the suit, and was therefore an incompetent witness under Section 2 of the Evidence Act; that the same objection applied to Mathias Kobe, a son of the deceased Mathias Kobe. An order of court entered May 20, 1946, found that all of the former plaintiffs, including Anna Maynard and Mathias Kobe, were not proper parties to the suit and the decree found that the former plaintiffs were no longer parties to the suit after the entry of that order. Under the record we think that the chancellor erred in holding that Mrs. Maynard and Mathias Kobe were disqualified under Section 2 of the Evidence Act. That they were competent witnesses, see Barnes v. Earle, supra, p. 383. We have examined carefully the offered testimony and are satisfied that certain parts of the testimony tend to support the claim of petitioner that appellant was guilty of fraudulent conduct in the matter of the joint account agreement. Appellant argues that the offered testimony was also subject to the charge that it was in the nature of hearsay evidence, but at the trial she did not point out to the chancellor the parts of the offered testimony that she claims was hearsay and the chancellor undoubtedly sustained the objection upon the ground that the witnesses were incompetent under Section 2. Upon a retrial of the cause the chancellor will have an opportunity to exclude from the offered testimony such parts of it, if any, as are in the nature of hearsay evidence.

Appellant contends that she "was entitled to be heard







upon the suggestion of damages on the dissolution of the injunction regardless of the final outcome of the case" and that the court erred "in refusing to hear any evidence of damages." Under the record we are of the opinion that there is no merit in this contention. The order to dissolve the temporary injunction was entered on May 20, 1946. On May 6, 1946, defendant Association had made a motion to deposit the funds in question with the clerk of the court and the same date that the injunction was dissolved the chancellor entered an order, without objection by any of the parties, that the Association should deposit forthwith with the clerk of the court the sum of \$3,107.99 there to remain until the further order of the court, and that plaintiffs deliver possession of the pass book to the Association simultaneously therewith. The fund deposited with the clerk became subject to the final order of the court. After the money was deposited, by agreement, with the clerk of the court the entry of an order dissolving the injunction was unnecessary. The injunction order restrained the Association from allowing the withdrawal of or paying, delivering or transferring to appellant, or to her order, any money in the joint savings account, and appellant could not have withdrawn any moneys from the Association even if there was no injunction against her. The depositing of the fund with the clerk of the court in accordance with the order of deposit, to which appellant consented, in its practical effect took the place of the injunction. We think that the chancellor was justified in refusing to hear evidence upon appellant's suggestion of damages.

We have reached the conclusion, after a careful study of this record, that justice will be best served by a retrial of the cause. We have not intended by anything that we have stated in this opinion to express any opinion as to the







merits of this cause..

The decretal judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

DECRETAL JUDGMENT REVERSED AND  
CAUSE REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.







Gen. No. 10305.

Agenda No. 10.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
OCTOBER TERM, A.D. 1948.

JOHN J. GREEN,  
Plaintiff-Appellee,

vs.

KENNETH YEAGER,  
Defendant-Appellant.

336 I.A. 312

Appeal from  
Circuit Court,  
LaSalle County  
Illinois.

WOLFE,-- P. J.

On the evening of Sept. 19, 1946, John J. Green drove his car South on Bloomington Street, in the City of Streator, Illinois, and parked it on the west side of the street, opposite Doctor Rampa's Office. Bloomington Street runs north and south through said city and is a residential street. Between 10th and 11th Street on Bloomington is Doctor Rampa's Office. Mr. Green walked across the street to the Doctor's Office, and a few minutes later started back across the street towards his automobile when he was struck by the automobile of Kenneth Yeager, and was severely injured.

John J. Green started a suit in the Circuit Court of LaSalle County, against Kenneth Yeager, alleging that he had been injured through the negligence of Kenneth Yeager, and asked damages in the amount of \$15,000.00. In the first count of his







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complaint he charges general negligence, specifying several acts of negligence on the part of the defendant, and also alleges that he himself was in the exercise of ordinary care for his own safety just before, and at the time that he was injured. The second count of the complaint alleges that the defendant was guilty of wilful and wanton misconduct that was the proximate cause of the plaintiff's injuries. The case was submitted to a jury, and at the close of the plaintiff's evidence, the defendant asked for, and tendered an instruction to find the defendant not guilty on both of the counts of the complaint. The Court overruled the motion and refused the instruction. The defendant then offered evidence, and at the close of which, he again made a motion for a directed verdict, and tendered an instruction to find the issues in favor of the defendant. The Court denied this motion and refused to give the instruction. The jury found the issues in favor of the plaintiff and assessed his damages at \$3,000.00. Judgment was entered on the verdict.

The defendant has prosecuted an appeal to this Court and assigned numerous errors why the judgment should be reversed. The appellee has assigned cross-errors alleging that the amount of the judgment is wholly inadequate, and asks to have the case reversed, solely for the purpose of assessing adequate damages.

It is insisted by the appellant that there is not sufficient evidence to sustain the count of wilful and wanton misconduct on the part of the defendant, and the verdict being a general one, the Court will presume that the jury found in favor of the plaintiff on the wilful and wanton count. This, no doubt, is the law. In *Greene vs. Noonan*, 372 Ill., we find the following: "Counsel for the appellee say that even though the court erred in refusing ✓







3.

to instruct as to the wilful and wanton charge, the rule in this State is that if there is one good count in a declaration it is enough to sustain a verdict and judgment, and that this applies to cases where the declaration contains counts that are not supported by evidence. However, there is also a rule in this State, pertaining to wilful and wanton counts in a declaration, which is controlling in the situation here. That rule is that where the declaration consists of several counts, one or more of which state a cause of action the gist of which is malice, with others based upon negligence only, and the verdict is general, without specifying the count on which it is based, the presumption is that the verdict is based upon a cause of action of which malice is the gist. (Buck v. Alex, 350 Ill. 167; Jernberg v. Mix, 199 id. 254.) And so here, the count upon which, under this presumption, the verdict is based, is the count or charge having no evidence to support it." We followed this case in Reell vs. Central Illinois Electric & Gas Co., 317 Ill. App. 106.

The question arises, does the evidence show that the appellant was guilty of wilful and wanton misconduct that would sustain the verdict in this case? The record discloses that the street on which Mr. Green was injured was nearly level; that the defendant was driving his car in the proper lane of traffic South on Bloomington Street at a reasonable rate of speed; that as Mr. Green stepped off of the pavement in front of the doctor's office to go across to his own car, he looked north, saw the car of the defendant approaching, but estimated it to be at about three hundred and fifty feet away. He says he did not see it



abstract as to the will and reason of the jury in this case. It is true that the jury is not bound to follow the instructions of the court, but it is not to substitute its own judgment for that of the court.

cases where the decision concerning the jury is not controlled by evidence. However, there is also a rule in this case, pertaining to willful and malicious intent in a decision, which is controlling in the situation here. That rule is that

the decision consists of several parts, one of which is to state a cause of action, the first of which is willful, which is based upon negligence only, and the second is malicious, and specifying the cause of action is in issue. The only

action is that the verdict is based upon a cause of action which willful is the first. (See v. West, 190 Ill. 100, 101; West v. West, 190 Ill. 100, 101. And see also, the same upon

and under this prescription, the verdict is based, is that on a charge which no evidence is required to support it. The following

case in West v. Central Illinois Telephone & Telegraph Co., 190 Ill. 100.

The question arises, does the evidence show that the defendant was guilty of willful and malicious conduct? That would be the verdict in this case. The record discloses that

street on which Mr. Green was injured was nearly level; that defendant was driving his car in the proper lane of traffic on Washington Street at a reasonable rate of speed; that

Mr. Green stepped off of the pavement in front of the defendant's car to cross to his own car, he looked north, and the defendant approached, but testified that he did not see it

until it was too late. He says he did not see it



4.

again until the car was just about upon him. There is no explanation why he didn't see it, as it came down the street. The evidence shows that there was a car approaching from the south and Mr. Green also failed to see this car. The appellant states he did not see Mr. Green until he was just about to strike him. It appears to us that the evidence wholly fails to prove that the defendant was guilty of wilful and wanton misconduct. The appellee argues that the appellant must have been driving at an excessive rate of speed, but speed alone will not support a verdict of wilful and wanton misconduct. (Bartolucci vs. Faleti, 382 Ill. 168.)

We find that there is not sufficient evidence to sustain a judgment based upon wilful and wanton misconduct of the defendant, and that the trial court erred in not directing a verdict in favor of the defendant on this count of the complaint. There being no evidence on which to base the judgment on the wilful and wanton misconduct, the judgment necessarily will be reversed, so it is not necessary for the Court to pass upon the other points raised by the appellant, or the cross-errors assigned by the appellee. The judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.







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385.  
Gen. No. 10312.

336 I.A. 313  
Agenda No. 16.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
OCTOBER TERM, A.D. 1948.

CHARLES E. JOHNSON,  
Plaintiff, Appellant. )  
vs. )  
BERTA CHRISTOFERSON,  
Defendant, Appellee. )

Appeal from the  
Circuit Court of  
Ogle County.

WOLFE,-- P. J.

Charles E. Johnson started a suit before a Justice of the Peace in Ogle County, against Berta Christoferson for damages he sustained to his automobile arising out of an accident occurring on U. S. Route 51 where it is intersected by a gravel road approximately one mile South of U. S. Route 64. Route 51 runs in a northerly and southerly direction and both plaintiff and defendant were proceeding south just prior to the accident. It is claimed that the defendant signaled for a left turn, and as plaintiff started to pass her on the right, he collided with a culvert and his car was damaged. Plaintiff procured judgment of \$300.00 before the Justice of the Peace, but the case was appealed to the Circuit Court, and on a hearing before that Court without a jury, the Court found the issues in favor of the defendant, and entered judgment accordingly, and it is from this



3361A-313

Agenda No. 10.

No. 10312.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
OCTOBER TERM, A.D. 1948.

CHARLES E. JOHNSON,  
Plaintiff, Appellant.  
vs.  
BERTA CHRISTOFERSON,  
Defendant, Appellee.

Appeal from the  
Circuit Court of  
Ogle County.

-- P. 1.

Charles E. Johnson started a suit before a Justice of the Peace in Ogle County, against Berta Christoferson for damages sustained to his automobile arising out of an accident occurring on U. S. Route 51 where it is intersected by a gravel road approximately one mile south of U. S. Route 64. Route 51 in a northerly and southerly direction and both plaintiff and defendant were proceeding south just prior to the accident. Plaintiff claimed that the defendant signaled for a left turn, and plaintiff started to pass her on the right, he collided with her and his car was damaged. Plaintiff procured judgment of \$100.00 before the Justice of the Peace, but the case was taken to the Circuit Court, and on a hearing before that Court a jury, the Court found the issues in favor of the defendant, and entered judgment accordingly, and it is from this



judgment that the appeal is prosecuted.

The plaintiff testified that he was driving in a southerly direction following the car of Berta Christoferson; that he was approximately fifty feet or less back of it, and just before they came into the intersection of a gravel road, Mrs. Christoferson gave a signal for a left-hand turn, and pulled her car over the black line, and then immediately proceeded to make a right-hand turn; that as Mrs. Christoferson signaled for the left turn, he pulled his car to the right and proceeded to pass her, but before he could get past, she pulled her car towards him and he either had to run into her car, or into the culvert.

Mr. J. C. Hayden was riding with Mr. Johnson in his car, and his evidence is corroboratory of testimony of Johnson that when Mrs. Christoferson started to turn, the left wheels of her car were over the black line, then she proceeded to turn west and they ran into the curbing. What the signal was that Mrs. Christoferson gave, is not clear from the evidence, but it is stated that she made a signal for a left-hand turn.

The testimony of Berta Christoferson on direct examination, as shown by the abstract, is as follows: "I lived one and one-half miles off 51 at the time of the accident on the intersecting road. I saw a car behind me and I put my right hand straight out as a signal. I started to turn, the next thing I knew I seen this car in there." On cross-examination she testified that in her opinion she was going about ten miles per hour; that she did not pull over the black line; that she gave the signal quite a ways before she reached the intersection, because she could see the car that was following her; that she lived



ment that the appeal is prosecuted.

The plaintiff testified that he was driving in a southern direction following the car of Berta Christoferson; that he was approximately fifty feet or less back of it, and just before they into the intersection of a gravel road, Mrs. Christoferson a signal for a left-hand turn, and pulled her car over the line, and then immediately proceeded to make a right-hand turn, that as Mrs. Christoferson signaled for the left turn, he and his car to the right and proceeded to pass her, but before could get past, she pulled her car towards him and he either to run into her car, or into the culvert.

Mr. J. C. Hayden was riding with Mr. Johnson in his car, his evidence is corroboratory of testimony of Johnson that Mrs. Christoferson started to turn, the left wheels of her were over the black line, then she proceeded to turn west they ran into the curbing. What the signal was that Mrs. Christoferson gave, is not clear from the evidence, but it is that she made a signal for a left-hand turn.

The testimony of Berta Christoferson on direct examination, as shown by the abstract, is as follows: "I lived one and a half miles off 51 at the time of the accident on the intersection road. I saw a car behind me and I put my right hand right out as a signal. I started to turn, the next thing I I seen this car in there." On cross-examination she testified that in her opinion she was going about ten miles per hour; she did not pull over the black line; that she gave the I quite a ways before she reached the intersection, because could see the car that was following her; that she lived



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about a mile and a half in the direction in which she was making the turn; that her front wheels were off of the pavement at the time the plaintiff tried to pass her.

Mr. Arthur Langley was called as a witness for the defense, said that he was riding as a passenger in Mrs. Christoferson's car sitting on the right-hand side in the back seat, and in his opinion she was not travelling faster at any time than thirty or thirty-five miles per hour. As she went to make the turn, she pulled to the right side of the road; that the wheels of his side were off of the pavement when she came to the intersection; that the plaintiff's car was on the shoulder of the road when he tried to pass; that Johnson was at the window of the Christoferson car when he first saw him; that in making the turn, Mrs. Christoferson was driving about ten miles per hour, and in his opinion no faster; that she did not swing out into the road at all, and her car was headed south when the plaintiff went by; that the shoulder on the road is twelve or fifteen feet wide. In answer to the question by the Court, he answered: "In approaching the intersection and making the turn, the wheels on the left of Mrs. Christoferson's car were never over the black line."

It is claimed by the appellee that the plaintiff cannot recover on account of his contributory negligence, and violating the motor vehicle law. Sec. 158 of Chapter 95<sup>1</sup>/<sub>2</sub> is as follows: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic and the condition of the highway." The Statute also provides what signals shall be given before a person makes a right or left-hand turn in turning



... and a wall in the direction in which it was moving.  
... that her front wheels were all on the pavement of the  
... the plaintiff tried to pass her.  
... Mr. Thomas Jackson was called as a witness for the defense.  
... that he was riding as a passenger in the defendant's car  
... on the right-hand side in the back seat, and in the direction  
... was not traveling faster at any time than thirty or twenty-  
... miles per hour. He did not see the car, and he did not  
... the right side of the road; that the driver of the car was  
... of the pavement and was on the left-hand side of the road  
... plaintiff's car was in the direction of the road when he  
... that Johnson was at the wheel of the defendant's car  
... he first saw him; that he saw the car, and that it was  
... on the left-hand side of the road, and that the driver  
... asked the car to stop and that the car did stop, and  
... car was backed away from the plaintiff's car and that the  
... of the road he drove on the right-hand side. In answer  
... question by the Court, he answered: "The defendant's car  
... backing and asking the car, the car was on the left of the  
... defendant's car was never over the line." ...  
... it is claimed by the appellee that the plaintiff's car  
... on account of his contributory negligence, and violating  
... motor vehicle law. The law of Georgia is as follows:  
... driver of a motor vehicle shall not follow another vehicle  
... closely so as to be hazardous and prevent the latter  
... the speed of such vehicles and the traffic and the condition  
... highway. The Statute also provides that signals shall  
... ever before a person who is a right-of-way hand in turning



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off a paved highway. It is conceded that Mrs. Christoferson did not make a proper signal of her intention to make the turn. It is the contention of the appellant that it was due entirely to her negligence that the injury occurred. The evidence shows that it was a clear day, and the pavement was dry. In answer to a question: "In what distance could you have stopped going at twenty-five miles an hour?" The plaintiff replied: "I imagine in five feet."

From the evidence in this case, it is our conclusion that the Court properly found the issues in favor of the defendant and entered judgment accordingly. If the plaintiff could have stopped his car within five feet, as he approached the defendant's car, there is no explanation why he didn't stop, instead of attempting to go around to the right, and it is our opinion that his own negligence was the proximate cause of the injury. The judgment of the trial court is affirmed.

Judgment affirmed.



...period highway. It is contended that the defendant  
not only a proper amount of care in driving but also  
a due consideration of the condition of the road and  
the possibility of the injury occurring. The evidence  
shows that it was a clear day, and the defendant was  
driving at a speed of 15 to 20 miles per hour. In  
the event of an accident, the plaintiff would be  
liable for the damages.

From the evidence in this case, it is the opinion  
of the court that the defendant is liable for the  
injury sustained by the plaintiff. It is the court's  
duty to render a judgment in accordance with the  
law, and there is no explanation why the plaintiff  
should be held liable for the injury. The court  
finds that the defendant is liable for the injury  
sustained by the plaintiff. The court's decision  
is affirmed.

...affirmed.



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No. 13253

957  
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In the  
APPELLATE COURT OF ILLINOIS  
Second District.

May Term, A. D. 1948.

3381.A. 313<sup>2</sup>

THE PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff, Defendant in Error, )  
 )  
vs. )  
 )  
CHARLES C. FRY, )  
 )  
Defendant, Plaintiff in Error. )  
 )  
Writ of Error  
to County Court,  
DeKalb County.  
-----  
Honorable  
Latham Castle,  
Judge Presiding.

BRISTOW, J. -- Defendant, Charles C. Fry, was found guilty of contributing to the delinquency of minors, by the county court of DeKalb County, and was sentenced to four months in jail and fined one hundred dollars. By writ of error defendant is endeavoring to reverse that judgment on the ground that the information charging the offense should properly have been quashed. The sufficiency of the information is, therefore, the sole issue before this court.

It is defendant's contention that the information does not set forth enough facts to apprise him with certainty of the offense with which he is charged, and that the information does not contain an allegation of knowledge and intent.

The cases are replete with the declaration that the test for the sufficiency of an information is whether or not the



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defendant is notified of the charge which he is to meet, so that he can properly prepare his defense. (People v. Westerdahl, 316 Ill. 86, 90; People v. Krause, 291 Ill. 64.)

The amended information herein states that on October 18, 1947, the defendant " . . . did then and there in a theatre building in DeKalb, Illinois, known as the Fargo Theatre, and located on East Lincoln Highway in said city, do acts in the presence of said female children which were acts of indecent and lascivious conduct, said minor children being, to wit: Loretta Herndon and Caroline Mathers."

The statute upon which the information is predicated provides:

"Any person who shall knowingly or wilfully cause, aid or encourage any male under the age of seventeen (17) years or any female under the age of eighteen (18) years to be or become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent . . . shall be deemed guilty of the crime of contributing to the delinquency of children and on conviction thereof shall be punished by fine of not more than two hundred dollars, or by imprisonment in the county jail, house of correction or workhouse not more than one (1) year, or by both such fine and imprisonment." (Ch. 38, sec. 104, Ill. Rev. Stats. 1947.)

A "delinquent child," as referred to in this section, is defined in section 103 of ch. 38 of the Ill. Rev. Stats., and includes one who is guilty of "indecent and lascivious conduct."

By the contents of the information herein, the defendant, Charles C. Fry, is notified in the language of the statute that he is charged with committing indecent and lascivious acts in the presence of two female minors at a specific time and place. The words "indecent and lascivious" are not only the precise terms used in the statute, but are words of common usage with a recognized meaning, connoting lustfulness and sensuality. (People v. Johnson, 392 Ill. 409; People v. Friedrich, 385 Ill. 175.)







In the Friedrich case, supra, where the defendant objected to the sufficiency of an information charging him with contributing to the delinquency of a minor by selling him "obscene and indecent" books, the court in deciding adversely to defendant stated at p. 179:

"The words obscene and indecent are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality."

The court further held, with reference to defendant's argument that the information did not charge the commission of a criminal offense, that the offense was charged in the language of the statute, and that according to established authority in this character of case that was all that the law required.

The Friedrich case is cited with approval, along with a series of other Illinois authorities, in People v. Jensen, 392 Ill. 72, where the court held that an indictment charging the offense of "indecent liberties" in the terms of the statute was sufficient, and specifically stated that the indictment need not necessarily describe the acts which the accused is alleged to have committed.

In the recent case of People v. Johnson, supra, an information charging the defendant with contributing to the delinquency of a child by committing an "indecent act" on the person of a child was likewise deemed sufficient to charge an offense, inasmuch as the term "indecent act" was regarded as a term of common usage.

On the basis of the foregoing established precedent it should not be necessary, therefore, in the instant case, to further particularize the sordid details of defendant's acts. Such conduct is generally deemed "too gross and obscene to spread on the records of the court." (People v. Jensen, 392 Ill. 72.)



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Defendant's contention herein that *People v. Chiafreddo*, 381 Ill. 214 is a determinative authority on the sufficiency of the information was specifically rejected by the court in the aforementioned Friedrich case. In *People v. Chiafreddo*, supra, it was held that the alleged acts of directing a child to disregard the school authority with reference to participating in certain flag exercises did not tend to create a state of dependency under the statute, making it an offense to contribute to the dependency of a minor; whereas in the Friedrich case the court stated that the act of selling an indecent book would clearly tend to corrupt the child's mind and contribute to indecent and lascivious conduct on his part which would constitute delinquency within the meaning of the statute.

Similarly, in the instant case defendant's indecent and lascivious acts in the presence of two minor children would also tend to contribute to the delinquency of such children. Furthermore, it is not necessary to allege that the child became delinquent as the result of such acts, for the offense is complete when the acts are committed. (*People v. Klyczek*, 307 Ill. 150, 157; *People v. Brozman*, 381 Ill. 545.)

It is apparent, therefore, that the accusation in the information herein clearly apprises the defendant, Charles C. Fry, of the criminal offense of which he is charged. Defendant either committed such indecent and lascivious act in the presence of the named minors in the Fargo Theatre on October 18, 1947, or he did not, and from these allegations he should be able to prepare a proper defense. Moreover, the allegations are sufficiently certain so that the defendant could plead double jeopardy to any subsequent charge for the same offense.

Inasmuch as the offense of which the defendant was accused was malum in se, or evil by nature, and was perforce knowingly







performed, no further allegation of specific intent was necessary under the terms of the statute.

With reference to the additional statement in the information that defendant did attempt to have indecent and immoral relations with two female children, this allegation can be regarded as surplusage, and the information can be sustained on the basis of the remainder of the count, which presents a sufficient charge upon which judgment could be entered. (People v. Moore, 365 Ill. 455.)

It is our opinion, therefore, that no error was committed by the county court in refusing to quash the information herein, which was in all respects legally sufficient, and the judgment entered by that court should properly be affirmed.

JUDGMENT AFFIRMED.







A hand-drawn diagram on a light blue background. It features a triangle with a vertical line passing through its center. The line is labeled 'A' at the top and 'B' at the bottom. The triangle is drawn with a blue line, and the vertical line is drawn with a red line.

in full

Agenda No. 3

Appeal from the

Circuit Court of

Sangamon County.

3

*[Faint handwritten notes at the bottom of the page]*

1. The first part of the text discusses the importance of understanding the context of a document. It emphasizes that without proper context, the meaning of the text can be lost or misinterpreted. This is particularly true for historical documents, where the social and cultural background is crucial for accurate interpretation.







12:22

She was assisted to a chair in the shoe department, and later made a purchase of some nylon hose in the store, and then left the building.

The plaintiff testified that a floor-walker employed by the defendant, whom she had long known as a "Mr. Miller", assisted her after the fall and told her "They had made a terrible mistake by oiling the night before because of this rain." The plaintiff introduced the Weather Bureau data showing that it started to rain on the day in question at about 8:00 A. M. and continued raining until about 6:00 P. M.

A complaint in the usual form averred that the defendant caused the floor of the said store to be oiled and left with a large amount of oil upon the surface so as to render it dangerous for all persons who might walk thereon, and that as a result of a rain that had fallen the day of the injury, various customers coming into the store had tracked the water and mud from the street upon the floor, and that the mud and water, combined with the excessive amount of oil on the floor caused the floor to be very slick and in an unsafe condition; and that the defendant had knowledge of this condition and took no precaution whatever to protect customers using the said store.

4 [1] In such a suit, the keeper of the store is not an insurer of the safety of the patrons, and the duty of the store owner being to keep his premises in a reasonably safe condition, so that customers will not be injured by reason of any unsafe condition on the premises. Devaney vs. Otis Elevator







Company, 251 Ill. 28; Jones vs. Kroger Grocery and Bakery<sup>ing</sup>  
Company, 273 Ill. App. 183; Antibus vs. W. T. Grant Company,  
297 Ill. App. 363.

④ [2] The plaintiff properly pleaded the necessary element of knowledge on the part of the defendant of the condition complained of. It then became incumbent upon her to produce some evidence reasonably tending to support such allegation if the trial court was not to direct a verdict at the close of the plaintiff's case.

In the case of Antibus vs. W. T. Grant Company, 297 Ill. App. 363, at page 365, the court said:

"It is necessary to allege and prove that Defendant knew of such unsafe condition, or that same existed for a period of time from which it might be inferred that they, by exercising ordinary care, could have learned of same; Calvert v. Spfld. Elect. Light & Power Co., 231 Ill. 290; Davis v. So. Side El. R. Co., 292 Ill. 378."

The evidence most favorable to the plaintiff is her testimony that after her fall she could see oil on the floor, and that there was water on the floor; that she felt the oil and "her hose and dress were full of it". There is no evidence as to how long the water had been on the floor. Plaintiff testified that she did not trip over anything or see anything there to cause her to fall. Plaintiff's theory as to when or how this water accumulated on the floor at the spot of the fall is purely speculative, as it could have been brought in on the shoes of the person immediately in front of her, on her own shoes, or could have been there for a longer period of time. This speculation cannot be indulged in. Antibus



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vs. W. T. Grant Company, supra; Michelson vs. Mandel Brothers, Inc., 322 Ill. App. 691. In the absence of evidence it cannot be presumed that the plaintiff slipped.

4 [4] The act of oiling the floor in itself is not negligence. In the case of Mack vs. Woman's Club of Aurora, 303 Ill. App. 217, the court said:

"The waxing of floors of this character is a common practice, and too well-known to be considered negligent in the absence of evidence tending to prove some positive negligent act or omission on the part of the owner of the premises, which contributed to the injury."

In the case of Murray vs. The Bedell Company, 256 Ill. App. 247, the court held that the proprietor of a store was not liable to an invitee who, on a rainy day, sustains injury by slipping and falling by reason of mud and water on a marble tile floor. On page 250 of that case the court cites Kresge Co. vs. Fader, 116 Ohio St. 718, cited by the appellant in support of its contention that it is not negligence per se to have oiled a floor in a store and the mere fact that someone falls on a floor does not produce a reasonable inference that the floor is dangerous.

4 [5] Assuming that the testimony about Mr. Miller was competent and considering it in the light most favorable to the plaintiff and as it existed at the close of plaintiff's case, we do not feel that this evidence proves any knowledge on the part of the defendant of the condition of the floor at the spot of the fall, or for what period of time such condition existed.

4 [6] In the opinion of this court there was a complete failure on the part of the plaintiff to prove that the defendant had actual knowledge of any unsafe condition of the floor



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at the spot of the fall, or that by the exercise of reasonable care could have known of the existence of any unsafe condition at that point at the time of the said injury. The plaintiff having failed to establish this essential of her right to recovery, the trial court should have directed a verdict for the defendant at the close of the plaintiff's case, and it is unnecessary for this court to consider any other errors assigned.

Judgment reversed.







44487

FRED G. BLOOM, GEORGE ZEIGLER  
and FREIDA FREITAG,  
Appellants,

v.

HARRY W. BLOOM,  
Appellee.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

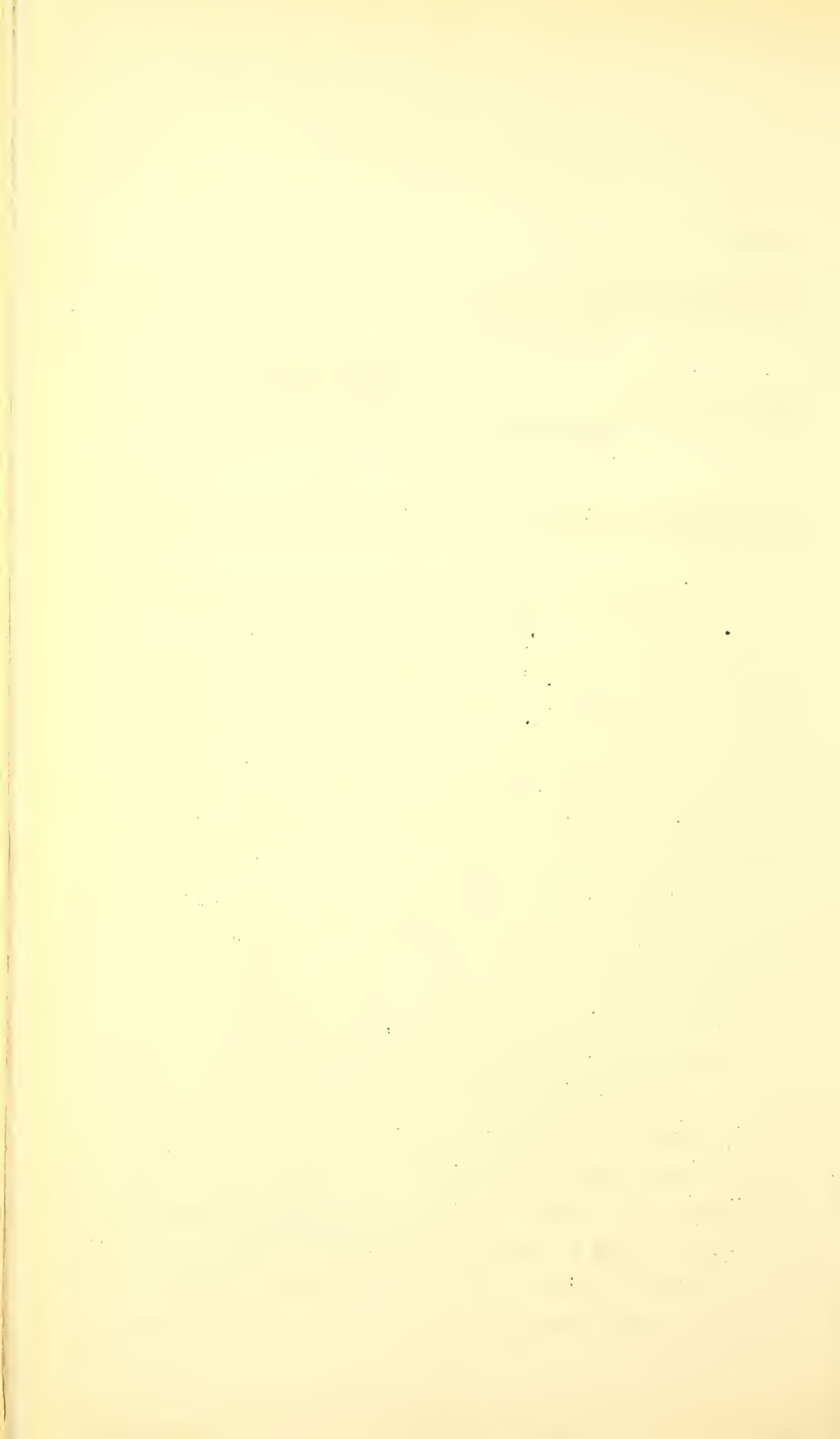
330 I.A. 352<sup>2</sup>

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF  
THE COURT.

Complainants filed their complaint for specific performance of an alleged oral contract made with defendant for an equal division of the estate of William A. Bloom, deceased, who by will left all of his property to the defendant. A motion to dismiss the complaint was made and sustained. Plaintiffs electing to stand by their complaint, it was dismissed for want of equity, to reverse which, this appeal is prosecuted.

The sufficiency of the complaint is the only question upon this appeal. It alleges in substance that plaintiffs are stepbrothers and stepsister of defendant; that plaintiffs were children of Rosie Zeigler; that she operated a bakery in partnership with the deceased, William Bloom; that plaintiffs, through many years, worked in the bakery with their mother and William Bloom and helped them accumulate, by such joint efforts, all of the real estate and personal property owned by Rosie Zeigler and William Bloom jointly; that Rosie Zeigler married William Bloom, and the title to the property was held by them jointly; that Rosie Zeigler had a child with William







2.

Bloom, the present defendant, and another child, who has since died; that Rosie Zeigler Bloom died, leaving a will devising all of her property to her husband, William Bloom; that the will was admitted to probate; that William Bloom, while ill and suffering from cancer, was induced by defendant and his wife to execute a will leaving all of his property to the defendant; that shortly after the will was made, plaintiffs discovered the fact and confronted defendant with the charge that he and his wife were instrumental in procuring William Bloom to execute such an unjust and improper will at a time when he was in bad health; that defendant agreed that the deceased should not be harrassed in his declining years by the question of rights and claims of plaintiffs, and that he recognized the inequity and impropriety of said will as to plaintiffs, and that plaintiffs need have no concern about the matter; that said defendant was willing to and would, if matters were left as they were, divide the net property equally among plaintiffs and defendant; that plaintiffs accepted such proposition and, having confidence in said defendant and relying upon said promise, made no effort to have William Bloom protect plaintiffs either by transfer of the property before his death or by a change in his will; that after the death of William Bloom, defendant failed and refused to carry out his agreement to divide said property; that plaintiffs and defendant had been brought up in the same family and in the same home, and that plaintiffs considered said defendant as their brother, treated him as such, and that likewise defendant considered plaintiffs as his brothers and sister, and that a confidential relationship thereby







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existed between plaintiffs and defendant.

We regard this complaint as insufficient to entitle plaintiffs to the equitable relief sought. It fails to show upon its face that there was any performance by plaintiffs, after the alleged oral agreement, to take it out of the Statute of Frauds. Flannery v. Woolverton, 329 Ill. 424, 430; McCallister v. McCallister, 342 Ill. 231, 236.

If forbearance is relied upon as a consideration, it must appear affirmatively that there was some legal right or color of legal claim which they delayed in enforcing, which resulted in a substantial change in their rights or position. Yager v. Lyon, 337 Ill. 271, 274; Shaver v. Wickwire, 335 Ill. 46. Plaintiffs were not heirs of William Bloom, and upon the allegations in this complaint, could not be regarded as parties in interest entitling them to contest the will of William Bloom, under paragraph 242, section 90, chapter 3, Illinois Revised Statutes, 1947. Merely to allege that the will was unjust and improper, and induced by the defendant and his wife, is not the assertion of a legal right to have the will set aside or render it invalid. If plaintiffs had any legal claim for the services rendered, there is nothing alleged in the complaint to excuse the failure to make proper claim against the estate of their mother. The complaint indicates clearly that the mother's will was regularly probated and not contested.

The decree of the Superior Court is correct, and it is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.







44522

JOHN J. McDONALD, a minor, by Roy A.  
McDonald, his father and next friend,  
Appellant,

v. .

CHICAGO STADIUM CORPORATION, a corpora-  
tion, ANDREW T. FRAIN, and JAMES  
GEORGAKAS,

Appellees.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

336 I.A. 353

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE  
COURT.

Plaintiff brought this action against defendants for  
an assault upon him, committed by an unidentified patron  
attending one of the performances in the Stadium, owned and  
controlled by the Stadium Corporation. A trial with a jury  
resulted in a verdict for plaintiff for \$3500.00. Defendants'  
motion for a new trial was overruled. The motion for judg-  
ment notwithstanding the verdict was allowed, and judgment  
was entered for defendants, from which plaintiff appeals.

Plaintiff on January 28, 1945, then a minor but having  
since reached his majority, attended a hockey game in the  
Stadium with his brother, sister and two friends. They  
had purchased tickets for reserved seats, and the section  
in which plaintiff had his seat consisted of two rows of  
about 30 reserved seats. All seats appeared to be occupied.  
There were uniformed ushers in charge. It appears that during  
the first period of intermission plaintiff, having temporarily  
left his seat, returned and found it occupied by an unknown  
person; that plaintiff requested him to vacate the seat, but  
the stranger ignored the request; that plaintiff endeavored







2.

to attract the attention of one of the ushers, who looked in plaintiff's direction but did not respond to his call. At that particular moment, without warning, another unidentified man in the second row hit plaintiff on the jaw and knocked him down, causing the injuries complained of.

The sole question upon this record is whether there was any evidence tending to prove negligence on the part of defendants, which proximately caused the alleged injuries. We find no evidence in the record of alleged overcrowding in violation of section 27, chapter 10-4/5 of the Illinois Revised Statutes, 1947, or the provisions of section 14, chapter 104 of the Municipal Code of Chicago. That people were standing in the aisles during the intermission and before the game started for the second period is a condition one customarily observes in all public gathering places where games of that type are conducted, and is no evidence in itself of overcrowding. If plaintiff relied upon the violation of the statute and the ordinance with respect to overcrowding, it was his burden to make proof thereof, which he has failed to do. Why the unidentified patron struck plaintiff is not explained either by evidence or inference and is left wholly to conjecture. We would not be warranted in holding that defendants could reasonably anticipate, under all the circumstances, that such an assault would be committed upon plaintiff.

The rule of law laid down in Shayne v. Coliseum Bldg. Corp., et al., 270 Ill. App. 547, applies with equal force to the facts in the instant case. In that case a public exhibition of a prize fight was conducted in the Coliseum. Two patrons engaged in an altercation which caused a near







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riot and resulted in injury to many of the patrons. It was there held:

"The burden is upon the plaintiff to show that reasonable notice of the impending danger had been given to the defendant and that it thereby became and was his duty to anticipate such a disturbance as occurred \* \* \*."

The record is devoid of any evidence of negligence on the part of defendants. The claimed negligence on the part of the usher, for failing to respond to the call of plaintiff to assist him in getting the stranger occupying plaintiff's seat to leave, could not, in any view, be deemed the proximate cause of the injury, resulting from the assault by another patron not involved in the dispute. Shayne v. Coliseum Bldg. Corp.

We think the court was correct in allowing the motion for judgment notwithstanding the verdict, and the judgment is accordingly affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.







44566

ALTHEA I. CUNNINGHAM,  
Appellant,  
v.  
CITY OF CHICAGO, a Municipal  
Corporation,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

335 I.A. 353

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT

Plaintiff brought this action to recover interest upon a condemnation judgment. Upon motion of defendant to dismiss the complaint, as amended, the court dismissed the complaint at plaintiff's costs.

It appears from plaintiff's complaint, as amended, that on June 9, 1926, she recovered a judgment against defendant in a proceeding under Section 42a of the Local Improvement Act, (ch. 24, par. 84, Ill. Rev. Stat. 1947), in the sum of \$164,000. On September 10, 1927, defendant made a partial payment of \$41,000 on said judgment and paid the balance of the principal of said judgment on December 22, 1927. No interest was paid, and on September 28, 1933, more than 5 years thereafter, this action was brought. Plaintiff claimed interest in the sum of \$12,000 upon said judgment. Count 2 of the amended complaint was in equity for an accounting, claiming a trust fund, as to the money collected in the first installment for said local improvement. The motion to dismiss was predicated upon the Statute of Limitations, and challenged the sufficiency of the allegations to establish a liability of defendant as trustee. The affidavit in support of said motion set forth as exhibits the vouchers delivered and endorsed by plaintiff







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in payment of the original judgment. The vouchers plainly showed that it was for the compensation awarded plaintiff for property in the condemnation proceeding, and the endorsement on each voucher read: "Received of the City of Chicago full payment of the within account." No counter-affidavit was filed, and it is conceded upon this appeal that these vouchers were given and received as set forth in the affidavit.

The question here arises whether the Statute of Limitations applies, as contended by defendant, or whether there is a trust fund created by Section 42a of the Local Improvement Act with respect to the first installment collected. Plaintiff contends she is a trust beneficiary to the extent of her pro rata share, and being a trust, the Statute of Limitations does not apply. The same contentions here made were presented by present counsel for plaintiff in Boal v. City of Chicago, 330 Ill. App. 614 (Abst.; Second Division). We agree with the reasoning and conclusion reached in that case, and it is controlling in the instant case. In dealing with the question of the trust fund theory now advanced by counsel, the court in that case said:

"Plaintiff contends that the statute of limitations does not apply to his claim because under Section 42a of the Local Improvement Act (ch. 24, par. 84, Ill. Rev. Stat. 1945), a direct trust is established for the benefit of the landowner whose property is taken for the improvement; that the instant case is based upon that section and that the point now raised by plaintiff has not been passed upon by the Appellate Courts nor the Supreme Court. Counsel for plaintiff state that in Trust Co. of Chicago City of Chicago, 327 Ill. App. 222, Section 42a 'was referred to by counsel merely in argument, but they contend that it was not involved in that case and 'was not relied upon by the appellant







company.' We have before us the briefs that were filed in that case, and while it is true that in the plaintiffs' brief they did not, apparently, rely upon Section 42a, we find that they were allowed to file, upon their request, 'Supplemental Citations and Suggestions', which is a brief of thirty-six printed pages and we find therein that the plaintiffs cite Section 42a and contend that it establishes a 'special trust fund applicable primarily to pay interest upon the condemnation awards which are charged specially by the statute upon the first installment,' when not promptly paid. 'Thereby the interest which accrues on first installment of special assessment is a permanent tax lien until paid, free from any and all statutes of limitation.' The argument made by the City in that case was practically the same as its argument upon the instant point in the case now before us. In Trust Co. of Chicago v. City of Chicago the opinion states: 'Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations,' and it was held, properly, we think, that 'plaintiffs' theory of a trust as set forth in their briefs is without merit.' The Supreme Court denied an appeal in that case. (391 Ill. 629.) \* \* \* We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and plaintiff, and therefore the statute of limitations applies to the instant claim."

We regard the judgment of the Circuit Court, in the light of the foregoing, as correct, and it is accordingly affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.







44599

PHILIP BLUM & CO., INC., a  
corporation,  
Appellee,

v.

STANDARD ACCIDENT INSURANCE CO.,  
a corporation,  
Appellant..

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

336 I.A. 354

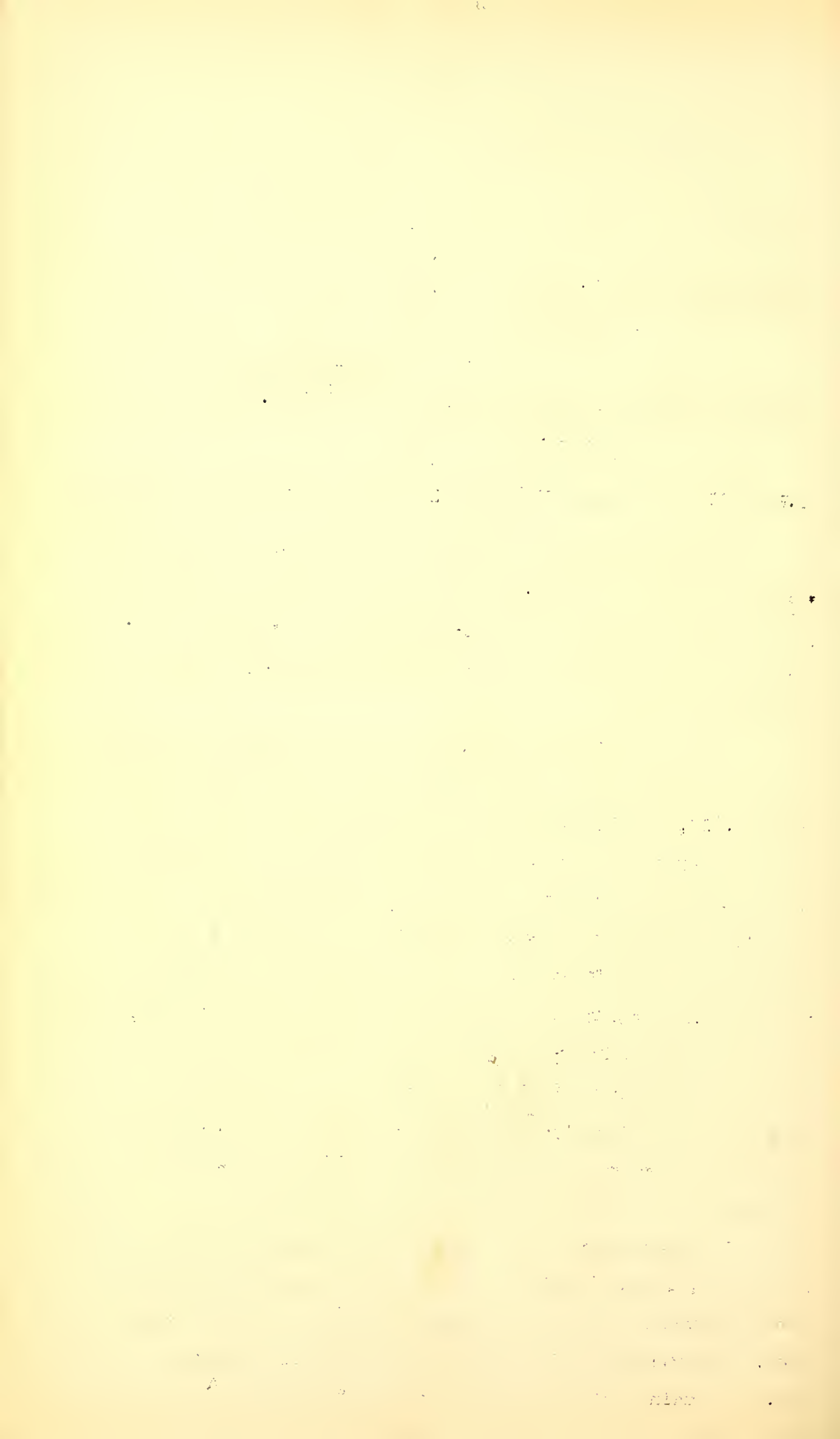
MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT

Plaintiff brought this action upon an insurance policy issued by defendant. The cause was tried without a jury upon a stipulation of facts. There was a finding and judgment for plaintiff in the sum of \$991.01, from which defendant appeals.

The liability of defendant depends upon the construction of the clause in the policy which reads: Loss Outside Premises. II, To Indemnify the assured, (a) for all direct loss of money and securities occurring outside the premises and caused by the actual destruction, disappearance or wrongful abstraction thereof "while being conveyed by a chauffeur or driver" within any of the States of the United States of America, the District of Columbia, Alaska, Hawaii, Canada or Newfoundland; and (b) for all direct loss of or damage to property caused by robbery or attempt thereat outside the premises "while such property is being conveyed by chauffeur or driver within the aforesaid territorial limits."

It appears from the stipulation of facts that on December 5, 1945, plaintiff had several trucks, two of which were involved in the suit, making deliveries in the Chicago area. The trucks had been rented from Truck Maintenance, Inc., who maintained a garage in which the trucks were







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housed over night. The drivers of the trucks were employees of plaintiff. Each morning the trucks were loaded with merchandise, consisting of liquors, and taken by the drivers on their routes to deliver the merchandise and collect the money from the retail vendors. Each truck was equipped with a Diebold safe placed on the rear of the truck, which could only be opened by the use of two keys. The drivers, after putting the money in the safes, had no way of opening them, the keys being kept on the premises of plaintiff. On the date in question the drivers completed their routes about 9 o'clock in the evening, and the trucks were taken to the garage of Truck Maintenance, Inc., at 1201 West Lake Street (not the premises of plaintiff). The following morning the two drivers picked up their trucks, drove to the premises of plaintiff, reported for work, and then obtained the duplicate keys to open the safes in the trucks. Upon opening them the contents of both safes were missing. The loss was \$999.01.

It appears that the trucks had been burglarized while in the garage of Truck Maintenance, Inc., on the night of December 5, 1945, and a report made to police; that when the trucks were stored in the garage during the night, they were unattended by any **chauffeur**, driver or employee of plaintiff; that an employee of Truck Maintenance, Inc., was in charge.

Upon the facts presented the question arises whether the loss occurred "while such property is being conveyed by a chauffeur or driver." Contracts of insurance, like any other contract, are to be construed according to the plain and ordinary meaning of the words used. Where there is no ambiguity in the language used, it is the duty of the courts to construe and enforce agreements as made and not to make new contracts for the parties. Crosse v. Supreme Lodge, 254







3.

Ill. 80; Blume v. Pittsburgh Life & Trust Co., 263 Ill. 160; Jacobson v. Liverpool, London & Globe Ins. Co., 135 Ill. App. 20; Bernhardt v. Merchants Reserve Life Ins. Co., 221 Ill. App. 66. We think the proper construction of the language "while being conveyed by a chauffeur or driver" means that the insurer intended the risk to apply only when the property was under the protective custody of a chauffeur or driver, and not while stored in premises not owned or controlled by the insured. The same policy had a clause providing for coverage against such loss while on the premises of the insured. This clause is not involved here, but it indicates an intention to limit the risk to loss of the property while in the protective custody of the insured, when on the premises, and when outside of the premises in the protective custody of its chauffeur or driver. The word "while" has been construed to mean "during or in the time that", "as long as", "at the same time as", Bernhardt v. Merchants Reserve Life Ins. Co., 221 Ill. App. 66, at p. 68, and in Chicago & A. R. Co. v. Fisher, 141 Ill. 614, was construed to mean "'during the time that,' and seems to necessarily imply some degree of continuance". In the instant case "while" should be given the same meaning and construction, especially in view of the added language "being conveyed by a chauffeur or driver." Jacobson v. Liverpool, London & Globe Ins. Co., supra; Bernhardt v. Merchants Reserve Life Ins. Co., supra. The rule contended for by plaintiff, that the language should be liberally construed to favor the insured, applies in cases of doubt and ambiguity, which we think does not exist with the language in the instant policy. Coons v. Home Life Ins. Co., 368 Ill. 231 at p. 238.

The judgment of the Circuit Court is reversed.

REVERSED.







44624

WILLIAM HURLEY,  
Appellant,

v.

EDWARD ZIMBON and STEVE MILLER,  
Appellees.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

3361.A.3551

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating a judgment entered by default on March 24, 1948, against defendants for \$555. The record discloses that a summons was served upon both defendants, and on December 2, 1947, a written appearance was filed on behalf of both of them. On the same day an order was entered extending the time 10 days for filing an answer.

On June 2, 1948, defendant Zimbon filed his petition under the statute in the nature of a writ of error coram nobis, to vacate the judgment entered by default, and alleged in substance that neither he nor any member of his family received a summons in the cause; that the judgment first came to his attention about May 19, 1948; and that he and defendant Miller have a meritorious defense to the plaintiff's cause of action, relying upon an order entered by the Federal Rent Expediter authorizing the amount collected for rent, which was alleged by plaintiff in his statement of claim to be excessive and in violation of Rent Control regulations.

An answer was filed to this petition, in which it was alleged that an appearance had been filed by both defendants on December 2, 1947; that a stipulation had been







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signed by Erwin L. Martay, as attorney for defendants, for the **extension** of time in which to file an answer for defendants, a copy of which stipulation is attached to the answer;<sup>and</sup> that on March 24, no answer having been filed, the judgment was entered by default. No reply was filed to this answer.

A hearing was had upon the petition and answer, and the court vacated the judgment entered by default.

Upon this appeal the sole question is the sufficiency of the petition to vacate the judgment. Nowhere in the petition is it alleged that defendants did not authorize the filing of the appearance, nor authorize the stipulation to have the time extended for filing an answer, and an order extending such time. Therefore, it must be presumed that they authorized the entry of the appearance and procured the order extending the time to file their answer. The filing of such an appearance waives the claim of the lack of service of summons and confers jurisdiction of the court over the person. Welter v. Bowman Dairy, 318 Ill. App. 305, 316; Ladies of Maccabees v. Harrington, 227 Ill. 511. The instant petition wholly fails to comply with the requirements of a motion or petition in the nature of a writ of error coram nobis. People v. Bristow, 391 Ill. 101, 116. Wagner v. Sulka, 336 Ill. App. 101, 104.

The order appealed from is reversed.

REVERSED.

Tuohy and Niemeyer, JJ., concur.







44528

CAROLINE AGNES TURVEY,  
Appellee,  
v.  
GEORGE E. TURVEY,  
Appellant.

APPEAL FROM SUPERIOR COURT  
COOK COUNTY

3361 A. 355<sup>2</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of divorce finding him guilty of extreme and repeated cruelty, contending that the decree is against the manifest weight of the evidence, that the alleged cruelty, if any, had been condoned and that the court erred in refusing to grant a new trial.

Under our statute the plaintiff must prove two or more acts of extreme cruelty. Plaintiff's evidence shows that on June 25, 1945, within several weeks after her return from the hospital where she had undergone an abdominal operation, defendant pinned her against a door, holding her arms and forcibly putting his knee against her groin, and that on October 9, 1945, while she was attempting to call the police, defendant ripped the telephone from the wall and threw it against plaintiff, inflicting a wound on her face. There is some corroboration of this testimony by plaintiff's daughter by a former deceased husband, and her sister. Defendant contradicts the testimony, but the trial court, who saw and heard the witnesses, was in a better position to determine the weight of the testimony than is this court and his findings cannot be disturbed.

Defendant contends that during the pendency of the







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divorce proceeding, when the court was attempting to reconcile the parties, he met plaintiff for dinner one evening and after dinner they went to a hotel where they remained in a room several hours and had intercourse. His testimony as to this incident is supported by a friend of long standing who, at defendant's request, shadowed them that evening and claims to have been in the lobby of the hotel when plaintiff and defendant entered. Plaintiff's testimony is in direct contradiction of that offered by the defendant. The testimony on behalf of defendant shows that he was endeavoring to entrap the plaintiff. The court was fully justified in rejecting his testimony and that of the amateur detective acting for him.

Defendant's motion for a new trial is insufficient because the evidence which defendant wished to produce on the new trial should have been produced on the original hearing.

The decree is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.







44547

JAMES H. RITSON,  
Appellee,

v.

THE NEW YORK, CHICAGO & ST. LOUIS  
RAILROAD COMPANY, a corporation,  
Appellant.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

338 I.A. 356

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$35,000 entered in an action under the Federal Employers' Liability Act.

Plaintiff, a switchman, claims to have been injured by the giving way of a brake platform upon which he was standing when releasing the brake in a switching operation in the course of his employment. He testified that while standing on the platform "the first thing I know down I went. This platform gave way and bent down, the end of it. I went down holding onto the brake wheel swinging there and stepped over, swung myself on back over to the draw-bar and I set the brake and I started up there and I started to get sick \*\*\*." No other evidence as to the cause of plaintiff's injury was offered or received. Defendant asks that the judgment be reversed and the cause remanded because, the evidence fails to show any negligence on defendant's part; the verdict is grossly excessive; there was error in giving plaintiff's instruction 6, 13 and 14; and because of newly discovered evidence. As the case must be tried again, we need not consider the complaint that the verdict is grossly excessive or that the trial court erred in failing to grant a new trial because of newly discovered evidence.







2.

Plaintiff's action under the Federal Employers' Liability Act is based upon the alleged negligence of the defendant. Section 1 as amended (45 U. S. C. A., sec. 51) makes the carrier liable to an employee for injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Instruction 6 instructed the jury that the Federal Employers' Liability Act "provides that a railroad company shall be liable in damages to an employee for injuries sustained as a result of the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency, in its cars and appliances." This instruction omits the words of the statute "due to its negligence" in the clause quoted above applying to injuries by reason of any defect or insufficiency in its cars, etc. This is reversible error. Seaboard Air Line Railway v. Horton, 233 U. S. 492, 501-2; Williams v. Southern Ry. Co., 253 Ill. App. 437. Instruction 13, relating to damages, permitted recovery for "all moneys which the plaintiff has necessarily expended, if any, and the bills which he necessarily became liable to pay, if any, in being treated for such injuries \*\*\*." It is conceded that there is no evidence of any expenditures or liability for the treatment of plaintiff for his injuries. This instruction is erroneous. Chicago City Ry. Co. v. Canevin, 72 Ill. App. 81, 90; Barton v. Southwick, 185 Ill. App. 24, 28. Instruction 14 recites the introduction of evidence showing the expectancy of life of a man of plaintiff's age to be 20.47 years, and tells the jury that this







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evidence is not conclusive or binding upon it; that the evidence was received as an aid to the jury in determining the probable expectancy of the life of plaintiff, and concludes: "The expectancy of life should not be used as a factor by multiplying the years of expectancy by the annual earnings. The award of damages for loss of future earnings, if any, must be reduced to its present cash value and adequate allowance should be made for the earning power of money. You are entitled to consider all factors or circumstances which might tend to increase or decrease the pecuniary loss." Defendant insists that this instruction was erroneous in directing the jury to "compute the present value of future loss of earnings" without giving any rule by which the jury could make such computation, as held by this court in Hayes v. New York Cent. R. Co., 328 Ill. App. 631, 644, and, because by the last sentence the jury is not restricted to the evidence in considering "all factors and circumstances which might tend to increase or decrease the pecuniary loss," citing Illinois Central R. Co. v. Johnson, 221 Ill. 42, 49, which lays down the generally accepted rule that the jury is restricted to the evidence in assessing damages. Plaintiff insists that this instruction is substantially the same as the instruction approved by this court in Montgomery v. Atchison, T & S. F. Ry. Co., 330 Ill. App. 334. With this contention we cannot agree. In the Montgomery case the instruction authorized the jury "to consider in connection with the matters and things in evidence other matters of common observation, knowledge and experience, which in a greater or less degree might have affected the earnings of plaintiff had he continued to work as a brakeman, namely, the probability, if such you find there is, of his







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illness, loss of employment, abstaining from work, reduction in wages, and infirmities of increasing age, with corresponding diminution of earning capacity." By this instruction the jury were limited in considering factors and circumstances which might affect plaintiff's pecuniary loss or future earning capacity to matters in evidence and "matters of common observation, knowledge and experience." No such limitation is placed upon the jury by the instruction before us, and the instruction is erroneous in the matters complained of.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Feinberg, P. J., and Tuohy, J., concur.







44570

EVERETT SIMPSON,  
Appellant,

v.

THE BEST LAUNDRY CO.,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO

3361.A.356

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in his action against defendant for the alleged loss of certain laundry valued at \$17.55, and from a later order entered on petition of defendant awarding defendant the sum of \$50 for attorney's fees and assessing the same as costs.

The abstract filed is merely an index of the record and affords no help in determining the questions raised by plaintiff. There is no transcript of proceedings on the trial, and the judgment for defendant is affirmed.

The defendant has failed to follow the appeal. We know of no authority for taxing attorney's fees as costs in an action of this nature, and the order of court awarding defendant \$50 as attorney's fees is reversed.

JUDGMENT AFFIRMED;  
ORDER AWARDING DEFENDANT  
ATTORNEY'S FEES AS PART OF  
COSTS IS REVERSED AND COSTS  
IN THIS COURT TAXED AGAINST  
PLAINTIFF.

Feinberg, P. J., and Tuohy, J., concur.







44563

EDWINA LARSON,  
Appellee,

v.

WANDA SLOWIK,  
Appellant.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY

336 I.A. 357

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for malicious prosecution arising out of a charge of assault and battery. From a judgment on a verdict for \$1500.00 defendant appeals.

Error is assigned upon the trial court's ruling in refusing to admit in evidence (a) a written report of the police investigation in the original controversy between the parties, and (b) the testimony of a police lieutenant who investigated following a complaint, as to what was said by defendant here, at the time the warrant for the arrest of the plaintiff was issued.

Plaintiff lived with her parents in the upper, and defendant with her husband and family in the lower apartment of the premises located at 5743 West Cornelia Avenue, in the City of Chicago, on May 15, 1946. At that time there was a quarrel between the parties, defendant testifying that plaintiff had swept certain debris under her door sill and when she remonstrated was attacked by plaintiff. Plaintiff, denying defendant's version, alleged that when she went to answer a call at the downstairs door she was challenged by the defendant who called her vile names and used opprobrious epithets. On June 28th, 1946, defendant went to the Shakespeare Avenue Police Station and secured a warrant







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for the arrest of the plaintiff charging disorderly conduct arising out of the May 15th quarrel. After a trial in the Municipal Court, plaintiff was found not guilty and discharged.

On the trial of the instant case a police officer brought to the stand a book in which were contained complaints issued over a period of time, including the complaint upon which the warrant for plaintiff's arrest was issued. The court asked for what purpose the complaint book was brought into court, and the attorney for defendant stated it was to show that the defendant made a complaint to the station on the night of May 15th. The court permitted that fact to be shown, but refused to permit the officer to state what further was contained in the complaint. No offer of proof was made, and we are unable to determine from the record what additional facts were sought to be proved by the complaint. Under such circumstances, we cannot say the action of the trial court was erroneous.

The second assignment of error has to do with the refusal of the court to permit Police Lt. Baginsky to testify "that he advised the defendant Wanda Slowik to obtain a warrant for the plaintiff Edwina Larson" on the morning after the quarrel. While it is well settled law in this State that where a person makes a true and complete disclosure of all the facts to an attorney-at-law and acting upon the advice of such attorney after such disclosure the party causes a warrant to issue, such fact may be shown as bearing upon the question of probable cause, however, no case has been cited to us by defendant extending the rule to police officers. The principal case relied upon, Shelton v. Barry, 328 Ill. App. 497, concerned the conduct of three police officers who,







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after reviewing the facts of an investigation made by an independent investigator, concluded that there was probable cause for making an arrest by virtue of Section 4 of Division VI of the Criminal Code of Illinois which permits a police officer to make an arrest without a warrant where he has reasonable ground for believing that the person to be arrested has committed the crime. It was held that the facts bearing upon the question of whether or not he had reasonable ground for believing that the crime had been committed might be shown. We fail to see the application of this case to the facts herein.

The case of Hirsch v. Feeney, 83 Ill. 548, relied upon by defendant states explicitly: "The law has never regarded the advice of detectives as being a justification for instituting mistaken criminal proceedings. It, on the contrary, is believed, that such persons, from the very nature of their business, become more suspicious than ordinary persons." The case contains language to the effect that the advice given by police officers was admissible in mitigation of damages; however, in order to avail himself of <sup>advice of</sup> counsel as a defense the defendant must show that he truly and correctly, fully and fairly, and in good faith, stated to counsel all the facts bearing on the guilt or innocence of the accused. 54 C.J.S. Malicious Prosecution § 49. There is no showing by way of offer or proof, or otherwise, that any such disclosure was made to the police officers at any time. We see no reason why police officers, assuming their advice to be admissible, should be allowed wider latitude in tendering it than permitted attorneys-at-law. Furthermore, approximately six weeks intervened between the







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time that the advice was given and it was acted upon. We are of the opinion that the damages awarded in this case were not excessive. Under these circumstances, we hold that it was not reversible error to refuse to admit the testimony of the police officer. ✓

The judgment of the Superior Court is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.







MORRIS REALTY COMPANY, a  
corporation,  
Appellant,

v.

MYRON D. GOLDBERG,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

336 I.A. 357<sup>2</sup>

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

On January 15, 1946 plaintiff entered into a lease demising the premises located at 343 East Garfield Boulevard, in the City of Chicago, to Charles Glenn, Alonzo Brooks, and Ernest Busch for the operation of a tavern and nightclub under the name Rhumboogie Cafe, Inc. On August 27, 1947 lessees executed a chattel mortgage to defendant on the lease and chattels contained on said premises. The lessees defaulted in the payment of rent for the month of April, 1947, and thereafter paid no rent to plaintiff. On April 30, 1947 there was a default on the chattel mortgage note due the defendant. In June of 1947 plaintiff confessed judgment on the lease for the rent due for the months of May and June, and again, on October 12, 1947, for the months of July, August, September, and October, 1947.

On July 3, 1947 defendant posted a notice of sale under the terms of the chattel mortgage, and on July 10th a foreclosure sale of the chattels was held on the premises. On July 21, 1947 plaintiff sued to recover from defendant \$1,000.00 for the use and occupancy of said premises and subsequently amended the same to \$2,500.00. There was a trial by the court without a jury and a finding and judgment for the







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defendant, from which judgment this appeal is taken.

Paragraph 12 of the lease in question contains the following provision:

"If Lessee shall vacate or abandon said premises or permit the same to remain vacant or unoccupied for a period of ten days, or in case of the non-payment of the rent reserved hereby, or any part thereof, or of the breach of any covenant in this lease contained, Lessee's right to the possession of the demised premises thereupon shall terminate, with or without any notice or demand whatsoever, and the mere retention of possession thereafter by Lessee shall constitute a forcible detainer of said demised premises, and if Lessor so elects, but not otherwise, \* \* \* this lease shall thereupon terminate \* \* \*."

Plaintiff urges that where the relationship of landlord and tenant does not exist a contract to pay rent will be inferred from the mere occupancy of the premises. With this statement of law and the numerous authorities cited in support thereof there can be no dispute. This rule of law, however, does not apply to the particular facts presented by the case at bar. Here we have a tenant in possession who has defaulted in the payment of rent. The landlord, under the terms of the lease, may elect to terminate the lease if he so desires, but otherwise the lease is effective. No steps were ever taken here to terminate the tenancy during the period for which rent is sought from defendant. It is true that a default existed in the payment of rent and that judgment by confession was taken against the tenant under the terms of the lease, but there was no attempt on the part of the landlord to oust the tenant. The defendant, who is entitled to possession of the chattels under the terms of his chattel mortgage, posted a notice of sale and later held a foreclosure sale on the premises. Such action implied no promise on his part to pay







3.

rent to the landlord who was not in possession and who, apparently, concurred in the continuance of the tenancy, notwithstanding the default in rental payment. The case is closely analogous to that of People v. Gilbert, 64 Ill. App. 203. There the sheriff levied upon the goods of the tenant and occupied the leased premises for the purpose of selling the same under execution. The lessor sued the sheriff for rent for the period of such occupation. The court, in holding that there was no liability on his part to the lessor, said (pp. 206, 207):

"The allegation that Mossler [lessee] never rented the premises after the occupancy of the sheriff, and never since that time paid any rent therefor, is no sufficient allegation upon which to predicate a legal conclusion that their lease had been ended.

"And unless the lease was terminated the sheriff was not responsible to the landlord for use and occupation, although he might be to Mossler.

"The sheriff certainly was not liable to the landlord, unless by the fact of his entry into the premises some condition of the lease became broken whereby the term of Mossler came to an end. But there is no allegation that the lease contained any such condition, and there is no allegation that the statutory method of terminating the lease was resorted to, nor that in any way the lease was put an end to by the landlord."

Further authority for the proposition that the mere non-payment of rent does not terminate a lease but that some action on the part of the lessor is necessary before the landlord and tenant relationship ceases to exist is found in the cases of Hamer v. Butterly, 189 Ill. App. 79, and Mayer v. Clarke, 129 Ill. App. 424. There being no evidence in the case at bar that the plaintiff herein ever elected to terminate the lease or that it took any action whatsoever to regain possession of the premises during the period for which it seeks to recover from the defendant, we conclude







4.

that plaintiff was not entitled to possession of the premises for the period which it seeks reimbursement, and therefore has no right of action against defendant.

Complaint is made that the trial court abused his discretion in interrogating one of the witnesses who was called on behalf of the plaintiff. This case was tried by the court without a jury and we cannot say that the trial court here abused his discretion in the examination of the witness. The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.







44389

KURT O. KRAUSS, doing business as  
UNIVERSAL LABEL CO.,

Appellant,

v.

MUTUAL MERCHANDISE CO., and  
E. M. STEVENS,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

336 I.A. 358

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE  
COURT.

On March 12, 1947, Kurt O. Krauss, doing business as Universal Label Co., filed a statement of claim in the Municipal Court of Chicago against Mutual Merchandise Co., and E. M. Stevens. Defendants filed an amended answer. On November 7, 1947 an ex parte judgment was entered against defendants. On November 13, 1947 they moved to vacate the judgment, supporting the motion by an affidavit. On the same day plaintiff moved to strike the affidavit in support of the motion to vacate. Plaintiff supported his motion to strike defendants' affidavit by filing an affidavit by the attorney for plaintiff. On the same day, November 13, 1947, the court ordered that the "motion to strike affidavit in support of motion to set aside ex parte verdict overruled." The record shows that the court, on the same day, entered the following order: "Postponed to February 18th, 1948." On November 22, 1947 plaintiff filed notice of appeal "from the final order overruling motion to deny motion of defendants-appellees, to vacate judgment in the above numbered and entitled cause, entered on November 7th, 1947."

Plaintiff, in his brief, states that the court "overruled the plaintiff's motion and verified petition,







sustaining the affidavit of defendant, and further ordered the finding and judgment heretofore entered vacated and reset the cause for further action." The record does not show such an order. Page 35 of the record shows that the court entered defendants' motion to vacate the judgment and that it overruled plaintiff's motion to strike defendants' affidavit in support of their motion to vacate.

Sec. 77 of the Civil Practice Act states that appeals shall lie to the appellate or supreme court in cases where any form of review may be allowed by law to revise the final judgments, orders or decrees of courts whose judgments, orders and decrees are reviewable therein. This is the same language as contained in Sec. 91 of the Civil Practice Act of 1947. Decisions as to what constitutes "final judgments" under the earlier act control as to this section. Under the authorities it is our duty to raise the question as to whether the order appealed from is a final order, judgment or decree. Where the court has no jurisdiction of the subject matter, the jurisdiction cannot be conferred by agreement of the parties and the matter of jurisdiction cannot be waived by failing to object. See Chicago Portrait Co. v. Chicago Cravon Co., 217 Ill. 200, and Board of Education v. Board of Education, 301 Ill. App. 228. The appeal is from an order overruling plaintiff's motion to deny defendants' motion to vacate the judgment. The order appealed from is not a final appealable order. According to the record the case is pending in the Municipal court of Chicago. For the reasons stated the appeal is dismissed at plaintiff's costs.

APPEAL DISMISSED.

KILEY AND LEWE, JJ. CONCUR.







44416

CHARLES F. HENRY,  
Appellant,

v.

LETA EARNEST,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

3351A.358<sup>2</sup>

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Charles F. Henry filed an action in forcible detainer against Leta Earnest for possession of apartment B-1 in the building at 4501 Malden Street, Chicago. A trial resulted in a verdict for the defendant. Plaintiff's motions for judgment notwithstanding the verdict and in the alternative for a new trial, were overruled, and judgment was entered on the verdict, to reverse which plaintiff appeals. Defendant did not appear herein or file a brief.

The evidence shows that plaintiff informed defendant that he desired the apartment for use by himself, as it had always been the manager's office; that she stated that she did not want to move; that plaintiff then made application to the rent control office of the OPA; that a hearing was had in that office; that the official in charge informed defendant that plaintiff was entitled to possession of the apartment; that on April 28, 1947 the OPA issued a certificate permitting the filing of an action for eviction to be commenced not sooner than August 27, 1947; that the action was commenced on September 15, 1947; that plaintiff informed defendant that he had another apartment available, for which he tendered a lease to her; that she refused to accept the tendered apartment because she had to find a place for the







woman who was living with her; and that she refused to accept the offer. Defendant testified that the woman living with her was employed as a bookkeeper; that this woman was paying her \$40 per month as rent; that defendant paid \$54.50 for rent; that the woman, while diabetic, worked all the time; that defendant did not have to take her to work; and that she was able to travel alone.

The burden was on plaintiff to prove that in seeking the apartment he was acting in good faith. The defendant did not attempt to show that plaintiff was not acting in good faith. She relied solely upon her contention that she would not accept any other apartment unless it was large enough to accommodate herself and the woman who was living with her. Under the evidence plaintiff was entitled to a judgment notwithstanding the verdict. For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter judgment of restitution for the plaintiff and against the defendant.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.







44572

NATIONAL UTILITY SERVICE, INC.,  
a corporation, Plaintiff-Appellant,

v.

HOWARD FOUNDRY COMPANY, a corporation,  
Defendant-Appellee.

9214  
APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

336 I.A. 359

MR. JUSTICE KILEY delivered the opinion of the court.

This is an appeal from an order directing plaintiff to repay to defendant \$1,800 which plaintiff had received in satisfaction of a judgment entered in this cause. The order directed that execution issue in the event plaintiff did not pay within 30 days. The appeal is by plaintiff.

Defendant made a motion in this court to dismiss the appeal. The motion is denied. The order is appealable (People v. Illinois State Bank, 312 Ill. 613) and the question presented is not moot since the money has not been paid and the order stands.

Plaintiff sued May 2, 1946 on a contract for fees for services rendered in bringing about reductions in defendant's utility rates. Defendant denied the reductions were due plaintiff's efforts. It counter claimed for about \$2,800, previously paid plaintiff under the contract. October 24, 1946, after a trial by the court without a jury, judgment was entered for plaintiff in the amount of \$2,496.23 and against defendant on its counter claim. Plaintiff's claim was for \$2,490.76 to September 18, 1945, and for additional fees thereafter in an amount which it could not "ascertain without reference to the records in the possession of the defendant." On November 4, 1946







NATIONAL UTILITY SERVICE, INC.,  
a corporation,  
Plaintiff-Appellant,

v.

HOWARD FOUNDRY COMPANY, a corporation,  
Defendant-Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE KILEY delivered the opinion of the court.

This is an appeal from an order directing plaintiff to repay to defendant \$1,800 which plaintiff had received in satisfaction of a judgment entered in this cause. The order directed that execution issue in the event plaintiff did not pay within 30 days. The appeal is by plaintiff.

Defendant made a motion in this court to dismiss the appeal. The motion is denied. The order is appealable (People v. Illinois State Bank, 312 Ill. 613) and the question presented is not moot since the money has not been paid and the order stands.

Plaintiff sued May 2, 1946 on a contract for fees for services rendered in bringing about reductions in defendant's utility rates. Defendant denied the reductions were due plaintiff's efforts. It counter claimed for about \$2,800, previously paid plaintiff under the contract. October 24, 1946, after a trial by the court without a jury, judgment was entered for plaintiff in the amount of \$2,496.23 and against defendant on its counter claim. Plaintiff's judgment, according to the statement of claim, was for the amount of fees which had accrued to September 18, 1945. On November 4, 1946 defendant moved for a new







defendant moved for a new trial and the motion was heard. On December 13, 1946, on plaintiff's motion, the judgment was reduced to \$1,800 and satisfied of record.

In October 1947, plaintiff sued again on the contract for fees accruing after September 25, 1945. November 13, 1947 defendant made a motion in the instant case for disposition of the motion for a new trial made in November 1946; for vacation of the judgment of December 13, 1946; for return of the \$1,800 paid in satisfaction thereof; and for consolidation of the two cases. Presumably, defendant filed no defense of accord and satisfaction in the second suit filed in October 1947. Pursuant to defendant's motion of November 13, a new trial was granted and the other matters continued. This court denied plaintiff's petition for leave to appeal from the order granting a new trial. Subsequently, the trial court vacated the judgment of December 13, 1946 and ordered the repayment of the \$1,800.

Defendant contends that this court's denial of the petition for leave to appeal is res judicata of the question of the validity of the order granting the new trial. The general rule is that adjudication on the first appeal is the law of the case on all subsequent appeals in which the facts are the same. 5 C. J. S. p. 1267. It is not the same as the res judicata rule, p. 1275. It is subject to qualifications which we think are applicable







trial and the motion was heard. Subsequently, the parties settled the matter. On December 13, 1946, the judgment was reduced to \$1,800 and satisfied of record.

In October 1947, plaintiff sued again on the contract for fees accruing after September 25, 1945. November 13, 1947 defendant made a motion in the instant case for disposition of the motion for a new trial made in November 1946; for vacation of the judgment of December 13, 1946; for return of the \$1,800 paid in satisfaction thereof; and for consolidation of the two cases. Presumably, defendant filed no defense of accord and satisfaction in the second suit filed in October 1947. Pursuant to defendant's motion of November 13, a new trial was granted and the other matters continued. This court denied plaintiff's petition for leave to appeal from the order granting a new trial. Subsequently, the trial court vacated the judgment of December 13, 1946 and ordered the repayment of the \$1,800. This, despite the fact that there was an issue made by the affidavit supporting the motion to vacate and plaintiff's counter affidavit. McJilton v. Love, 13 Ill. 486 and Bocock v. Leet, 210 Ill. App. 402.

Defendant contends that this court's denial of the petition for leave to appeal is res judicata of the question of the validity of the order granting the new trial. The general rule is that adjudication on the first appeal is the law of the case on all subsequent appeals in which the facts are the same. 5 C. J. S. .p. 1267. It is not the same as the res judicata rule, p. 1275. It is subject to qualifications which we think are applicable







3.

here.. 5 C.J.S. p. 1277, 1278. The rule is not inflexible. Thomason v. Motor Coach Co., 298 Ill. App. 626, 19 N.E. (2d) 435. The petition for leave to appeal which this court denied did not assert that the trial court lacked jurisdiction to enter the order granting the new trial. It raised other contentions. The jurisdictional point is now raised. We think justice requires that we reconsider our previous order.

The appeal from the order directing the repayment brings before us the order granting the new trial. One rests upon the other.

The motion made in November 1947 was not in the nature of error coram nobis. It depended upon the breach, after judgment, of a settlement agreement. The court had no jurisdiction in December 1947 to order a new trial of a cause in which judgment by agreement was entered a year before. The motion of November 1947 could not revive the motion for a new trial made the year before. That earlier motion expired with the entry of the judgment. The order granting the new trial was void. The order vacating the judgment and directing the repayment is void. Both orders are hereby reversed.

ORDERS REVERSED.

BURKE, P. J., and LEVE, J., CONCUR.







44118

J. HAWLEY, )  
Appellee, )

v. )

SYLVIA ZDROJESKI, )  
Appellee, )

and HARRY J. DUFFNER, JR., )  
Appellant. )

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

336 I.A. 392

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Harry J. Duffner, Jr., appeals from adverse judgments entered on two separate verdicts in a suit brought for property damage resulting from the collision of two automobiles in Chicago on July 1, 1945.

The accident occurred shortly after noon at the intersection of West 100th street and Torrence avenue. As plaintiff Joseph B. Hawley was driving his automobile west on 100th street he came to the intersection of Torrence avenue, where the stop-and-go-light for east and west traffic was red, and accordingly stopped. An automobile driven by Duffner, going east on 100th street, likewise came to a stop on the red signal, but after a reasonable interval he observed that the lights were not operating. Since his view to the south was obstructed by a home and surrounding shubbery on the southwest corner, he moved into the intersection at a moderate rate of speed, as he testified, and had reached a point somewhere near the middle of the intersection when a northbound automobile, driven by Sylvia Zdrojeski, who had the green light in her favor, proceeded across the intersection of 100th street, and suddenly noticing Duffner's car, swerved to the right and proceeded northeastwardly, striking and damaging plaintiff's standing automobile.

There is considerable conflict in the evidence as to some of the salient facts. However, it is conceded that



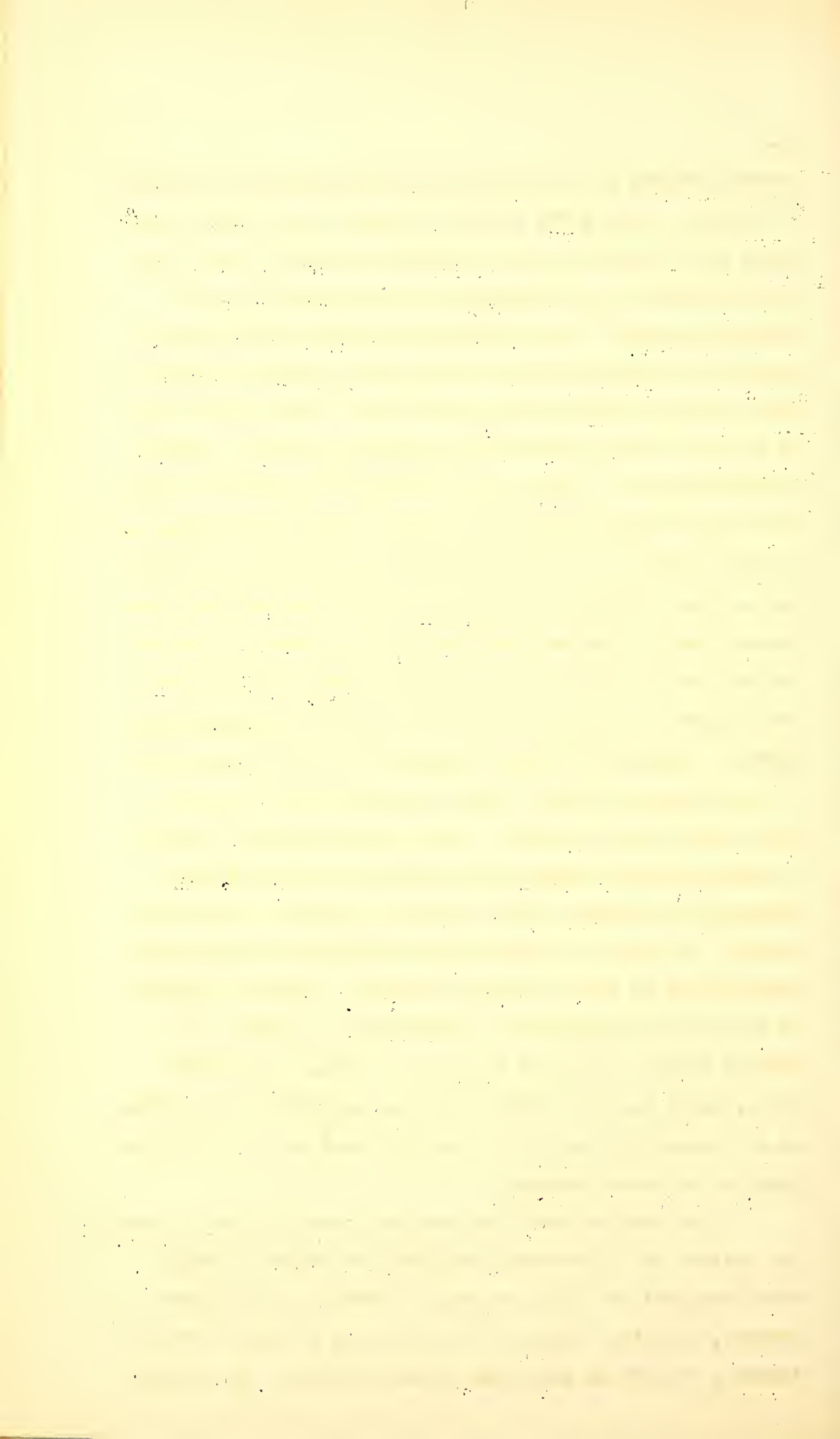




Duffner brought his car to rest before passing the west curb of Torrence avenue, but he was so close to the south curb of 100th street that his view of Torrence avenue to the south was obstructed by the building and the shrubbery on the southwest corner. The defendant Zdrojeski testified that Duffner was driving between twenty and twenty-five miles an hour when she first saw him, but Hawley estimated his speed at closer to between five and ten miles per hour. Duffner testified that he could see the Zdrojeski car about seventy-five feet to the south when he entered the intersection, and he stated that he immediately stopped his car; nevertheless the evidence clearly shows that he had driven out from one-quarter to more than one-half of the way across the intersecting street when the car from the south, which had the green light, was suddenly confronted by his presence there. Duffner contends that Miss Zdrojeski had some fifteen feet or more leeway in front of his car, and that it was not necessary for her to swerve to the right in order to gain clearance, and his counsel argue that the driver of the Zdrojeski car became excited and lost control of her automobile. The speed at which Miss Zdrojeski came through the intersection is not seriously disputed. Plaintiff thought it was between thirty-five to forty miles an hour, but Duffner himself estimated her speed at about thirty-five miles, which the jury would have been justified in regarding as not excessive, in view of the fact that she had the green light as she came through.

The jury returned two verdicts, one in favor of Hawley and against the defendants Zdrojeski and Duffner jointly. Miss Zdrojeski had filed an amended counterclaim against Duffner, claiming damages to her car, and the jury also returned a verdict in her favor against Duffner. The verdict







and judgment in favor of plaintiff amounted to \$276.15; that against Duffner and in favor of Zdrojeski was \$200.00. After trial a stipulation was entered into between Hawley and Zdrojeski, dismissing the latter as a party defendant, and an order was entered to that effect. Judgments were then entered in favor of Hawley against Duffner, and in favor of Zdrojeski against Duffner.

As the principal ground for reversal Duffner contends that the verdicts and judgments are contrary to the law and the evidence. Without reciting in detail the testimony of the various witnesses, we have stated in general the principal items of evidence adduced upon the hearing. It is evident and undisputed that Duffner moved into the intersection when he observed that the lights were not working, and as Miss Zdrojeski's car approached the intersection, she was suddenly confronted by Duffner's car, which was close to the center of the intersection. Whether it was necessary for her to swerve to the right or not, was a question of fact for the jury. The pertinent consideration is that she was faced with a sudden danger from which she sought to extricate herself, and again it was a question of fact for the jury whether, in so doing, she was in the exercise of reasonable care under the circumstances. The law is well settled that if a person, without fault on his part, is confronted with sudden danger or apparent sudden danger, he is not charged with the same degree of care as would be required under other circumstances. Stack v. East St. Louis Ry. Co., 245 Ill. 308; Barnes v. Danville Street Ry. Co., 235 Ill. 566; Klooster v. Friel, Ill. Appellate Court, First District, No. 43766, filed 11-13-47 (not abstracted); Lasko v. Meier, 327 Ill. App. 5; Rzeszewski v. Barth, 324 Ill. App. 345; Synwolt v. Klank, 296 Ill. App. 79; and Mahan v. Richardson, 284 Ill. App. 493. "One who is







forced to act under the stress of nervous excitement produced by a peril which confronts him is not expected to act with the coolness and precision or with the prudence that under other circumstances would be considered an essential of due care." 38 Am. Jur., Negligence § 194, p. 874 (and cases cited therein). Under the facts in evidence we would not be justified in holding that the verdicts and judgments are contrary to the law and the evidence. So far as Hawley is concerned, his car was properly standing still, awaiting a change of signals, and it is not even suggested that he was guilty of misconduct or contributory negligence.

As an additional ground for reversal it is urged that the verdicts of the jury were inconsistent. In this case there were two separate and distinct suits, tried together for purposes of convenience. We find no authority supporting the suggestion that there was any inconsistency in the verdicts. Plaintiff's claim charged negligence and wanton and wilful misconduct on the part of both defendants, but the charge of wilful and wanton misconduct was evidently abandoned, because the court gave no instructions on that phase of the case, and neither of the parties argued the charge. The trial proceeded solely on the theory of negligence. The inconsistency of the verdicts for which defendant argues is predicated on the theory that the contributory negligence of Sylvia Zdrojeski would be no defense to the charge of wilful and wanton misconduct. We think this point is eliminated from the case by the dismissal of the suit against her on the part of plaintiff before judgment was entered. Under the law of this state a plaintiff may dismiss one joint tort-feasor after verdict and take judgment against the other (Lasley v. Crawford, 228 Ill. App. 590; Kultz v. Jahaaske, 312 Ill. App. 623), and that is precisely what plaintiff did.







Various other points raised by defendant have had our careful consideration, but we find no merit in any of them. The case was fairly tried, and upon the record presented we think the jury were justified in finding in favor of plaintiff against Duffner in the one instance, and in favor of Zdrojeski against Duffner in the other. Accordingly both judgments are affirmed.

JUDGMENTS AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.







APPELLATE COURT,  
STATE OF ILLINOIS,  
Fourth District,  
October Term, A. D. 1948.

AGENDA NO. 2

TERM NO. 48-0-1

Dora Imogene McIntosh, )  
Plaintiff-Appellee, )  
-vs- )  
Paul McIntosh, )  
Defendant-Appellant, )  
Dora Imogene McIntosh, )  
Plaintiff-Appellant, )  
-vs- )  
Paul McIntosh, )  
Defendant-Appellee. )

336 I.A. 333

Appeal from the  
Circuit Court of  
Williamson County,  
Illinois.

BARDENS, J.

Plaintiff, Dora Imogene Edwards (formerly McIntosh) filed in the circuit court of Williamson County, Illinois on June 30, 1947 her petition for modification of a decree theretofore entered on, to-wit, December 28, 1946 upon the hearing of her suit for divorce against the defendant, Paul McIntosh, in and by which petition plaintiff sought to have said decree modified with respect to the custody of their two minor children. In her complaint for divorce there appears the following allegation: "That due to the fact plaintiff is working and at the present time does not have a permanent home she believes it to be for the best interests of her said children that their care, custody and control be awarded to the defendant, with reasonable rights of visitation in plaintiff, and with the further right in plaintiff of having the care, custody, control and companionship of said children on each Sunday of each and every week until modified by the further decree of this court, said right of custody and companionship of her children to







be enjoyed away from the home of the defendant." On the hearing of that suit plaintiff was granted a divorce on the grounds of cruelty, the decree reciting "that she has always conducted herself towards said Paul McIntosh in a manner well becoming a good, true and virtuous wife x x ." In her petition for modification plaintiff alleges that "since the entry of said decree material and significant changes have taken place in the conditions and circumstances affecting the best interests and welfare of said minor children upon the one hand, and the separate rights of the father and mother, on the other, which changes are hereinafter more fully set forth" and, further, "that at the time of the entry of the decree aforesaid plaintiff was unable to hire anyone to take care of said children, had no permanent home of her own, and was not in a position to properly care for and minister to the wants and needs of her said minor children and, as a result of her necessitous circumstances was compelled to request this honorable court to award the care, custody and control of her said children to the defendant."

Although a transcript of the evidence produced on the hearing of the divorce case is not incorporated in this record, both parties have quoted certain excerpts therefrom in their briefs; on the part of the plaintiff, as follows:

"Q. Now, with reference to the children, Mrs. McIntosh, are you asking the court that the custody of the children be given to your husband at the present time?

A. Yes.

Q. Why are you asking the custody be given to him, now?

A. Because I have no permanent home to take them to, but later if I have a place to take them I want







the custody of the children".

That part of the evidence quoted by the defendant, is as follows:

"Q. Is your husband, Mr. McIntosh, a fit person to have the custody of the children?

A. Yes, because his mother has my oldest child and his sister has my youngest baby and I know they are both in good hands for now, and they are taken care of."

Answer of the defendant to petition of plaintiff for modification of the former decree, as above, denying that petitioner is entitled to the relief sought, or any part thereof, with a motion to dismiss said petition on the grounds the petitioner does not allege any facts showing a change materially in the circumstances and conditions and relationship of the parties in interest since the rendition of the original decree, was filed October 20, 1947. The motion to dismiss the petition was denied by the court, and thereupon a hearing was had on the petition and answer, at the conclusion of which, among other findings as to jurisdiction, etc. the court found "that at the time of the entry of the decree herein, petitioner was unable to hire anyone to take care of said children, had no permanent home of her own, was not in a position to properly care for and minister to the wants and needs of her two minor children; that now that petitioner has remarried and has a home of her own she is in a position to support, maintain and care for her children and furnish them with a suitable home and education and the comforts and necessities of life; that petitioner has not forfeited her right to said children; that in the eyes of this court she has ever since her marriage to Kenneth Edwards, by her conduct and her attempts to establish herself so that she might regain the custody of her children, redeemed herself from the stigma attaching to any of the







imputations of misconduct alleged by the defendant; that both plaintiff and her husband are ready, anxious and willing to take said children into their home, and desire to support, maintain and care for said children; that the mother is a fit and proper person to be awarded the custody of said children."

Here follow findings with reference to the care given the younger child, Sharon Fay McIntosh, by defendant's sister, Mrs. Louise Plagee, in whose care she has been since the separation of the parties, and as to the care given to the older child, Paula Kay McIntosh, by Mrs. Ella McIntosh, mother of the defendant with whom she has been since the separation of the parties, and with whom the defendant has at all times since the separation resided. The court further finds "that material changes have taken place in the conditions and circumstances affecting the best interests and welfare of said minor children, upon the one hand, and the separate rights of the father and mother, upon the other, since the original decree was entered herein on December 28, 1946" and, following a recital as to the intention of the court to retain the sole and exclusive jurisdiction over its wards, Paula Kay McIntosh and Sharon Fay McIntosh, states "that the court in this case, in its findings of facts, is guided by the controlling circumstances in awarding the custody of said children, as herein set forth by the best interests and welfare of such children", and finds "that in the instant case, from the records before it, and the pleadings, finds that the mother is a fit party at the present to have the care, custody, control and education of the minor child, Paula Kay McIntosh; that the father is a fit and proper party at the present to have the care, custody, control and education of the minor child, Sharon Fay McIntosh, as long as possession of said child is retained by the sister of the defendant, Mrs. Louise Plagee, in her







home", and thereupon awarded custody of the two children in accordance with the last above mentioned findings, fixed the rights of visitation of the parents, and ordered, adjudged and decreed that the former decree be modified accordingly.

Both parties have appealed from the modified decree so made and entered, claiming the court erred in the awarding of custody as therein shown.

We have reviewed the evidence in this matter and are of the opinion that the findings of the chancellor and his conclusions are amply supported thereby. All the parties were before the court and from observation, as well as testimony, the chancellor was in a better position to determine the matter than could an appellate tribunal. *Buehler -v- Buehler*, 373 Ill. 626 at page 630 (27 N. E. 2d 466). The trial court, in matters of custody, should be allowed a wide discretion. *Serotzke -v- Serotzke*, 335 Ill App. 485. The decree is therefore affirmed.

Decree Affirmed.

(Publish abstract only)

Culbertson, P.J. and Scheineman, J. Concur

FILED

JAN 17 1949

*Stanley B. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







In the  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT  
October Term, A. D. 1948

4983

TERM NO. 48029

AGENDA NO. 9

FIRST APOSTOLIC CHURCH OF  
NEW HAVEN, ILLINOIS,  
Plaintiff-Appellee,

-vs-

MARTIN HOLTZCLAW,  
Defendant-Appellant.

)  
)  
) Appeal from the  
) Circuit Court of  
) Gallatin County,  
) Illinois.

)  
) Honorable Charles T.  
) Randolph, Presiding  
) Judge.

Scheineman, J.

3361.A.393<sup>2</sup>

This suit was originally filed before a magistrate, under the Forcible Entry and Detainer Act, Chap. 57, Ill. Rev. St. It was again tried upon appeal before the Circuit Court of Gallatin County, resulting in a judgment in favor of plaintiff, from which the defendant appeals.

The plaintiff is a religious corporation, organized under Illinois law, and the defendant was its pastor, so acting for several years, and at least until the night before this action was brought. The premises involved consist of the church building and site, used for no purpose other than church services.

There being no pleadings, the issues must be deduced solely from the evidence and the arguments presented. The nature of the suit necessarily implies that plaintiff is claiming the right to possession of the premises, and that defendant is unlawfully withholding possession. The defendant denies withholding the premises, also denies that this suit was brought by the authorized and elected trustees of the church, and apparently implies







also that he is still the pastor of said church.

The evidence discloses that an Affidavit of Incorporation of the plaintiff was filed of record in 1943 which conformed to the requirements of Section 165 of the Corporation Act. Chap. 32, Ill. Rev. St. In this affidavit, five trustees were named. On September 9, 1947, four of these designated trustees held a meeting and duly adopted a resolution that "Martin Holtzclaw is hereby discharged as pastor - - -" and authorized this suit. The suit was filed and summons served the next day.

During the period between incorporation and the discharge of the pastor, it was ~~xxx~~<sup>his</sup> usual custom to conduct services on Sunday. In addition, other services were held on Wednesday, and Saturday, also some Sabbath School Meetings on Sunday, but none of these was conducted by the pastor. It is undisputed that all of these meetings were open to anyone, and no person was denied access to the church by the pastor or any one else. However, there was some dissention, or "confusion" among the membership, and some held services in the Town Hall. There was parol evidence (and a purported record), that new trustees had been elected, replacing the originals. Much of the testimony concerned who had the key to the church and what was done with it. Both sides also offered evidence of occurrences after suit was brought. This we will not consider, since the trial in circuit court was merely a trial de novo of the original case. Prasnikar vs. Harmeling, 329 Ill. App. 341.

So far as authority of the original trustees pertains to bringing this suit, we must rule against the appellant. No corporate records were produced of any change, although there was filed of record a second Affidavit of Incorporation which named different trustees. The purpose of a second affidavit is confined by Section 165 to changing







the corporate name or amending its provisions. Elections of succeeding trustees are covered by Section 168, and no certificate thereof is filed pursuant to the act, as is plainly stated therein. There being at least a prima facie showing of authority in these original trustees, this court will decline to make further inquiry into their status. This is not the proper proceeding to try their title to office.

As to unlawful detainer of the premises, we have combed the record, and find nothing whatever to sustain this charge. We are unable to attach any importance to the evidence regarding possession of the key, whether the pastor had it, or a janitor appointed by him, or some one else. There is no dispute that appellant was the pastor, at least until September 9, 1947. There is no assertion by any witness that he ever used the premises for any purpose not connected with his pastorate. When services were held, any one could enter the premises, whether the pastor was present or not. When the premises were not in use, we may assume they were locked, and the pastor may have had a key, or the only key, but we find nothing startling, unusual or unlawful about such fact, if it is a fact. Actually, we do not find that appellee contends it was unlawful, but the contentions are somewhat obscure. There is no claim that any constituted officers of the church discharged the pastor prior to September 9, 1947.

Assuming, but not deciding, that appellant was effectively discharged on September 9, 1947, and thereafter had no right to perform pastoral duties for plaintiff, still there is not a scintilla of evidence that he was exercising any dominion or possessory acts over the premises between that date and the time of filing this suit. There is nothing to show that he even went near the premises, and it is admitted that he no longer had the key, which was then in pos-







session of a former pastor who is not a party to this action.

The action of Forcible Entry and Detainer is purely statutory and its use is limited to cases provided by the statute creating it. Laysod vs. Martin, 305 Ill. App. 1; Whitehill vs. Cooke, 140 Ill. App. 520. To maintain the action the plaintiff must prove that defendant was in possession and was unlawfully withholding possession. Laysod vs. Martin (Supra); Godair's Estate vs. Case 220 Ill. App. 348; McCluskey vs. Nelson, 179 Ill. App. 182; Haas vs. Juul, 178 Ill. App. 397; Grant vs. Schwartz 183 Ill. App. 202. Such proof is entirely absent from the record before us.

It may properly be added that the record and the briefs before us seem to indicate that the purpose of this action by plaintiff was to try the right of appellant to continue in the position of pastor, and he retaliated by attempting to try the right of the trustees to their office. Neither question is properly before the court in this form of action, which is limited solely to the question of possession of real estate. The plaintiff having failed to prove that the defendant was unlawfully withholding possession, or even that he was in possession at the time suit was filed, it is not entitled to judgment; accordingly, the judgment is reversed.

Judgment Reversed.

Culbertson, P.J. and Bardens, J. concur.

(Publish abstract only)

**FILED**  
JAN 17 1949  
*Stanley R. Brown*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







APPELLATE COURT,  
STATE OF ILLINOIS,  
Fourth District,  
October Term, A. D. 1948.

A  
963

Term No. 48-0-11

Agenda No. 18

James J. Hoban and Joseph A. Lambert, Doing business as Midwest Service Company,	)	Appeal from the
Plaintiffs-Appellees,	)	Circuit Court of
-vs-	)	Madison County, Illinois.
Johns - Manville Products Corporation, a corporation,	)	
Defendant-Appellant.	)	

336 I.A. 467

BARDENS, J.

Plaintiffs James J. Hoban and Joseph A. Lambert, doing business as the Midwest Service Company, filed their complaint against Johns - Manville Products Corporation, a Corporation, defendant, in the circuit court of Madison County, Illinois on the 23rd day of July, A. D. 1947. The complaint, in substance, alleges that during the months of January to and including June, 1946 plaintiffs were engaged in operating a slag pile and in selling slag to various customers and that during the course of such business they sold and delivered to the defendant 139 car loads of slag, totaling 16,300,500 pounds; that defendant agreed to pay for said slag at a price of 90 cents per ton, or a total of \$7,335.54; that plaintiffs have performed all services required of them; that numerous demands were made upon the defendant for the purchase price, but that no part of said sum has been paid, and that the entire sum is now due and owing to the plaintiffs. The complaint then prays judgment against the defendant in the sum of \$7,335.54, plus interest at the rate of five per cent from May 14, 1946.

Within the time allowed defendant to plead or answer the complaint, the defendant filed an interpleader







setting up that it was ready and willing to pay the sum of \$7,335.54 into court and asking that it be allowed to do so because the St. Louis Smelting & Refining Company was also claiming said funds and asserting ownership to the slag sold and delivered to said defendant. Plaintiffs thereafter filed a motion to strike the interpleader and to enter judgment on the pleadings in favor of the plaintiffs. There were other pleadings filed in the case which it is not necessary now to describe for reasons hereinafter set forth. However, on the second day of February, 1948, after having previously heard arguments of counsel on the motion to strike defendant's interpleader and for judgment on the pleadings, the court allowed the motion; struck the interpleader; found defendant in default, and entered judgment in favor of the plaintiffs and against the defendant for the sum of \$7,335.54, together with interest at the rate of five per cent from May 14, 1946, which interest totaled the sum of \$621.25. Thereafter, the defendant entered its motion to vacate the judgment and to be permitted to answer the complaint. This motion was denied by the court. On the 15th day of April, 1948, notice of appeal was filed by the defendant, and the case is in this court pursuant to said notice. On the 26th day of April, following, the defendant partially satisfied the judgment entered by the trial court by the payment of \$7,452.47, which consisted of the principal amount of the judgment, together with interest thereon from the date of the judgment to the date of the partial satisfaction, and also paid the costs of suit. By this payment all questions in this case have become moot, except the question of the allowance of interest in the total sum of \$621.25, as above noted; and, upon oral argument, the attorneys for both sides conceded that questions regarding the interpleader were now out of the case. It is therefore unnecessary for this court to pass







upon any errors assigned, except the one challenging the allowance of interest.

After the case had reached this court, and after the abstract of record, statements, briefs and arguments of both appellant and appellee had been filed, the plaintiffs-appellees asked leave of this court to file an additional abstract of record to show the partial satisfaction of the judgment. This motion was taken with the case, and is now allowed for the purpose, only, of informing this court that all questions, except the allowance of interest, are moot.

The defendant challenges the allowance of interest in this case, principally, upon the ground that since the judgment was rendered on the complaint, confessed, without the taking of testimony, the allowance of interest is erroneous because there are not sufficient facts alleged in the complaint to justify the allowance of interest.

It is a familiar rule, so familiar, in fact, that it needs no citation of authority, that a default is only deemed to admit the traversable allegations contained in the complaint and does not admit conclusions of law or allegations of damages, and does not admit that the facts stated constitute a legal cause of action.

An examination of the complaint shows that there are no facts stated with reference to an allowance of interest; that the only mention of interest in the complaint is in the prayer for judgment; that there is no allegation of delivery dates, but only the statement that the slag was delivered between January and June, inclusive, and there is no allegation that the time of payment was agreed upon. There is, therefore, nothing in the complaint upon which to base any finding that the plaintiffs were entitled to interest from May 14, 1946, and that part of the judgment that allowed interest in the total sum of \$621.25 was erroneous. The judgment for the principal sum having been







paid, this court will take no action thereon, but that part of the judgment separately awarding to plaintiffs interest in the sum of \$621.25 is reversed and the cause remanded to the trial court with directions to allow the parties to plead and tender an issue on the question of interest, only.

~~Affirmed in part~~ and Reversed in part,  
with directions.

(Publish in Abstract Form, only)

Presiding Justice Culbertson  
and Justice Scheineman Concur.

FILED

JAN 14 1949

*Stanley R. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







336  
Adm. 31.0  
3-23-44

In Re:

No. 48011

962

James J. Hoban and Joseph A. Lambert, Doing Business  
as Midwest Service Company, Plaintiffs-Appellees,

-vs-

Johns-Manville Products Corporation, a Corporation,  
Defendant-Appellant.

It is ordered by the Court that the opinion as heretofore  
filed in the above entitled cause on January 14th, 1949,  
be modified on motion by striking and eliminating certain  
words at the end of said opinion, to-wit:

"IT IS THEREFORE ORDERED BY THIS COURT that  
the opinion be modified to strike out at  
the end of the opinion, Affirmed in Part  
and Reversed in Part, and substitute,  
therefor, REVERSED IN PART WITH DIRECTIONS.  
It is further ordered that costs be taxed  
against Appellees."

Bardens, Justice.

Culbertson, P. J. and Scheineman, J. Concur.

FILED

FEB 22 1949

*Stanley B. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

October Term, A.D. 1948

Term No. 48 O 17

Agenda No. 20

OTTO OWEN,

Plaintiff-Appellant,

-vs-

MAX GRAY,

Defendant-Appellee.

)  
)  
) Appeal from the  
) County Court of  
) Madison County,  
) Illinois.  
)  
)  
)

336 I.A. 468

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CULBERTSON, P. J.

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This is an appeal by Plaintiff-Appellant, OTTO OWEN (hereinafter called plaintiff), from a judgment of the County Court of Madison County, Illinois, wherein judgment in bar of plaintiff's cause of action and against plaintiff for costs, was rendered in favor of Defendant-Appellee, MAX GRAY (hereinafter called defendant).

This litigation was started by plaintiff, OTTO OWEN, filing a suit in a Justice-of-the-Peace Court, against defendant, MAX GRAY, to recover a sum not exceeding \$500.00. On trial of the cause in the Justice Court, the defendant prevailed, and an appeal was duly perfected to the County Court of Madison County, where the cause was tried by a Court and Jury, and a verdict finding defendant not guilty was returned by the jury. After a motion for new trial had been heard and denied, judgment was rendered on the verdict, and this appeal follows.

The factual situation giving rise to this litigation discloses that the plaintiff, who was employed in a Refinery in Wood River, Illinois, owned a forty-acre tract of land about fifteen miles from Wood River. This tract of land was improved with a three-room residence, and six out-buildings, designated







as a new barn, granary, a corncrib, machine shed, coal shed, and an old barn. It appears the defendant herein, Max Gray, moved upon this tract of land in 1943 as a tenant of the plaintiff, and continued to occupy said premises as a tenant, until February of 1948, when he vacated the premises. Plaintiff contends at the time the defendant moved onto the premises the new barn was in good condition; the granary was in sound condition; the machine shed was enclosed on three sides by walls and on one side by doors; the coal shed was in fair condition; and the old barn in poor condition. A former tenant of the property testified and his testimony gives support to plaintiff's contention that the outbuildings were usable when the defendant herein moved on the property. Plaintiff testified he did not visit the premises very often, and the last time he did so was in March, 1945, when he found all the out-buildings, except the new barn, had disappeared. Plaintiff contends he had never at any time given defendant permission to tear down any of the out-buildings, and it is for the resultant damage that he brings this suit. Proof was made as to the pecuniary damage plaintiff contends he had sustained.

Defendant testified that he rented the farm from the plaintiff and moved there in 1943, and at the time he moved on the property every building on the place leaked, and that the out-buildings, except the new barn, were in poor condition. Defendant contends plaintiff gave him permission to tear the buildings down, and to use the lumber to repair bridges, and to make other repairs when needed. Defendant further testified that after he had torn down the buildings he used some of the lumber to enlarge the house so they could have four rooms, instead of three, and that he used some of the lumber to make hog houses, and to repair bridges, and fix one thing and another, and that part of it was in such condition that it wasn't usable at all. Defendant's contention that he had permission to tear down the buildings finds some support in the testimony of the







witness Martin, who testified he was present at the time plaintiff told defendant he "wanted those buildings torn down because he was tired of looking at the rotten things," and that defendant then told him, "All right, he would tear them down."

Defendant further testified that about a month or so after the buildings were torn down, plaintiff came out to the place and said the "place looked better than it had for twenty years."

Defendant contends plaintiff didn't say anything about destroying the buildings or that he wanted any pay for the buildings that had been torn down, and the first time plaintiff asked defendant for any pay for the buildings was in the spring of 1947. We believe this fairly summarizes the evidence produced on the trial of this cause.

Plaintiff contends in this Court that the judgment should be reversed for the following reasons: (1) That the judgment of the Trial Court was contrary to the manifest weight of the evidence; (2) That the trial Court erred in refusing to admit competent, relevant, and material evidence offered by plaintiff; (3) That the Trial Court improperly influenced the Jury against plaintiff by its action and conduct; and (4) That the Trial Court improperly restrained the attorney for plaintiff in his argument to the Jury.

It appears to us that a fair question of fact was presented to the Jury for its determination in this case, and they have adopted the view contended for by defendant, and we do not believe the view they have adopted is contrary to the manifest weight of the evidence, and we, therefore, have no right to disturb the finding of the Jury. "There are many things which a jury observes on the trial in such cases that do not appear from the printed word. The appearance of the respective witnesses and their manner of testifying, and a great many other circumstances. They are in much better position in such cases to determine the truth of the matter in controversy than a Court of Review. Under the law, we cannot







disturb the verdict of the jury, unless it is clearly against the manifest weight of the evidence (SCHNEIDERMAN vs. INTER-STATE TRANSIT LINES, 331 Ill. App. 143)."

We have given consideration to the other assignments of error, and believe they are without merit.

The judgment of the County Court of Madison County having abundant support in the evidence, and there being no error that would warrant a reversal of this case, the judgment of the County Court of Madison County is affirmed.

Judgment affirmed.

Bardens, J.; Scheineman, J., Concur.

(Abstract)

FILED

FEB 7 1949

*Stanley R. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A.D. 1948

Term No. 48 O 27

Agenda No. 11

G. W. HALSENBURG,

Plaintiff-Appellee,

-vs-

WILLIAM DEE, doing business  
as DEE FLORAL COMPANY,

Defendant-Appellant.

Appeal from the  
County Court of  
Madison County,  
Illinois.

336 I.A. 468

CULBERTSON, P. J.

This is an appeal from a judgment of the County Court of Madison County, Illinois, in the amount of \$327.02, in favor of Plaintiff-Appellee, G. W. HALSENBURG (hereinafter called plaintiff), and against Defendant-Appellant, WILLIAM DEE, doing business as DEE FLORAL COMPANY (hereinafter called defendant).

This litigation was originally instituted in the court of a Justice-of-the-Peace, wherein, on the trial, judgment was rendered in favor of the plaintiff, and after an appeal had been taken to the County Court, the matter came on before said Court, whereupon said cause was tried in said Court without the intervention of a jury, and plaintiff prevailed and secured a judgment for \$327.02, and this appeal follows.

The factual situation giving rise to this litigation discloses that this is a suit for damages arising out of a collision between two motor vehicles at the intersection of Fifth and Alby Streets in Alton, Illinois, and which collision occurred on February 13, 1945. The judgment represents property damage only, there being no claim in the suit for personal injuries. Fifth Street in Alton, runs in a general east and







west direction, and Alby Street runs in a general north and south direction. The evidence discloses that immediately before the impact the plaintiff, Halsenburg, was driving his car in a southerly direction on Alby Street, and the defendant's truck was being driven west on Fifth Street. Plaintiff testified he was driving at a speed of about fifteen miles an hour as he approached the intersection of Alby and Fifth Streets, and that he looked both ways, but did not observe the defendant's truck, although he saw another car proceeding in an easterly direction on Fifth Street. Plaintiff contends that when he was almost past the center of the intersection, on the west side thereof, the vehicle operated by defendant's agent, coming west on Fifth Street, collided with plaintiff's car.

Frank Nash, a witness called on behalf of plaintiff, testified that he was driving east on Fifth Street at the time of the collision, and had stopped on the south side of Fifth Street, preparatory to turning onto Alby Street, and that he saw both the plaintiff's car and the defendant's truck coming towards the intersection. He testified both vehicles approached at a rapid pace, and gave as his opinion, that plaintiff's car was traveling about twenty to twenty five miles an hour, and the defendant's truck going twenty five to thirty miles an hour. He further testified that neither of the cars slowed down, and that the collision occurred when plaintiff's car was two-thirds of the way across the intersection and right in front of his car. Nash also testified that there were stop-signs on both sides of Fifth Street, and that there were no stop-signs for Alby Street traffic. The driver of defendant's truck testified that he was driving between fifteen and twenty miles an hour; that he first observed plaintiff's car when it was ten or fifteen feet from the intersection, and at that time it was going thirty five or forty miles an hour, and did not slow down before the impact. This witness makes no contention that he stopped before entering the intersection, but contends that







upon seeing plaintiff's car he applied his brakes and swerved to the left to avoid a collision, but that the right front fender of his truck came in contact with plaintiff's car. The driver of defendant's truck contends there are no stop-signs at the intersection in question.

It is contended in this Court that the Trial Court erred in granting judgment for the plaintiff, because there was no evidence that plaintiff was free from contributory negligence and because the evidence conclusively showed that plaintiff was guilty of contributory negligence. This is the narrowed issue presented to us for determination on this appeal.

It would appear to us, from an examination of the record in this case, that an issue of fact was presented to the Trial Court who heard this case and tried same without a jury on the issues contended for in this appeal, and his finding is entitled to the same weight as is a verdict of a jury, and will not be disturbed by an Appellate Tribunal, unless it is manifestly against the weight of the evidence (MOORE vs. DAVID J. MOLLOY CO., 222 Ill. App. 295, 298; McCRACKEN vs. FIRST NAT'L BK. OF WHEATON, 204 Ill. App. 20, 21).

In giving consideration to the question of whether or not the finding of the trial Court is contrary to the manifest weight of the evidence, a Reviewing Court must have regard for the better opportunity of the Trial Court to determine the facts by reason of its opportunity to see and hear the witnesses (MARBLE vs. MARBLE, 304 Ill. 229, 232; CITY OF QUINCY vs. KEMPER, 304 Ill. 303, 307).

There was in this case a positive burden upon plaintiff to prove by a preponderance of the evidence the negligence of the defendant as charged, and his own freedom from contributory negligence, unless the Court concluded from the evidence that the defendant was guilty of wilful and wanton misconduct (ABRAMOVITZ vs. CHICAGO CITY RY. CO., 172 Ill. App. 208, 211; ASHLAND AUTO GARAGE vs. CHICAGO RYS. CO., 183 Ill. App. 207, 208).







An examination of the evidence in this case persuades us and we so hold, that the Court could properly have concluded that the plaintiff had met the burdens imposed upon him by law to prevail in this case, and we find that the judgment of the Court is not against the manifest weight of the evidence, but on the contrary, the evidence gives abundant support to the finding and judgment of the Trial Court in favor of the plaintiff.

The judgment of the County Court of Madison County, Illinois is, hereby, affirmed.

Judgment affirmed.

Bardens, J.; Scheineman, J., concur.

(Abstract)

FILED

FEB 7 1949

*Stanley B. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS







44256

ROBERT H. ESPENSHADE,  
Appellant,

v.

RUBY CHEVROLET SALES  
CORPORATION,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

336 I.A. 469

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action under section 205(c) and 205(e) of the Emergency Price Control Act of 1942 as amended, for triple the amount by which the consideration paid for a warranted used car exceeded the maximum price at which it could have been sold without warranty, plus costs, reasonable attorney's fees, and damages for breach of warranty. During the trial plaintiff abandoned his cause of action for breach of warranty under the Sales Act and asked for leave to file a supplemental statement of claim alleging a rescission of the sale, which was denied. At the close of plaintiff's evidence the court found the issues for defendant and entered judgment accordingly. Plaintiff appeals,

Plaintiff purchased a 1937 two-door Chevrolet automobile from defendant for \$435.41.

Plaintiff's principal contention is that the automobile in controversy was not in good operating condition at the date of sale, as defined in Maximum Price Regulation 540, which reads as follows:

"A used car is in good operating condition when its functional parts and those of its nonfunctional parts which are customarily attached to a car, are in a condition that will permit the used car to be







2.

driven safely and efficiently. Functional parts include but are not limited to: the chassis, motor, clutch, transmission, drive shaft, differential, steering mechanism, front axle, rear axle, brakes, battery, and lighting system.

Plaintiff testified in substance that when the automobile was delivered to him on February 23, 1946 he had difficulty getting it started; that "the front wheels wobbled"; that at times the brakes would not hold; that the oil pan and radiator leaked; and that it would not attain a speed in excess of twenty-five miles an hour; that on the following Monday, February 25, 1946 he took the car back to defendant; that after the car was returned to plaintiff the brakes were still defective, the clutch slipped, the radiator leaked, and he found a puddle of oil in front of the car; that the next time he drove the car was on March 1; that on this occasion he again had difficulty starting the car, and that it stalled five or six times; that on March 9 he took the car back to defendant for repairs and that he used it only part of the time from March 9 to March 16.

Curtis Radcliff, plaintiff's brother-in-law, testified that he operated a service station; that on February 23, 1946, he inspected plaintiff's automobile at his place of business; that he put the car on a rack and found the "shock arms" were loose, the muffler thin, that the rear spring was riding on the frame; that the clutch was chattering, and the oil pan dripping.

William Armstrong, called in behalf of plaintiff, testified that on March 3 he rode to work with plaintiff in his automobile and noticed "a heavy grinding/<sup>of</sup>gears" while shifting from first to second and third speed; that the clutch grabbed, and while riding with plaintiff on other occasions he observed that the brakes did not function properly. This witness further testified that in August,







3.

1946, he drove plaintiff's automobile to Mackinaw; that at that time there was no grinding of gears; that the "clutch was better" and that the brakes "gave good stoppage." Counsel for both parties stipulated that if Wilbur Mulligan and Donald Elliott were called in behalf of plaintiff they would testify that plaintiff's automobile "stalled" when they rode in it.

Plaintiff maintains that the test of "good operating conditions" as used in Maximum Price Regulation 540 is whether the car is in such condition that it can be driven safely and efficiently. Defendant says that the phrase "good operating condition" should be interpreted in the light of all the surrounding facts and circumstances.

At the time of delivery of the automobile in controversy to plaintiff on February 23, 1946, it was more than ten years old and according to the speedometer reading as shown by defendant's written warranty it had been driven 62,482 miles. Defendant's warranty provided that the car was to remain in good operating condition for a period of 30 days after delivery, or for 1,000 miles, whichever might occur first and that during this period defendant would make necessary repairs and replacements at a cost to plaintiff of not more than 50 per cent of the normal charge. The evidence shows that some of the repairs and adjustments on plaintiff's automobile were made free of charge and that as to the others there is no complaint made that they were excessive.

Plaintiff offered in evidence a paid bill for repairs <sup>him</sup> given/by defendant (exhibit 3) dated March 23, 1946, which shows the speedometer **reading** of plaintiff's automobile at 63,428 miles. According to plaintiff's own testimony, he drove his automobile on Saturday February 23 and returned it to







defendant's place of business for repairs on the following Monday, February 25, where it remained more than one day; that he drove it on March 1 and took it to defendant's establishment for adjustments on March 2; that between March 9 and 16 he used his automobile only part of the time. Thus it appears that during the period from February 23, 1946, the date of delivery, until March 23, 1946, plaintiff drove his automobile 946 miles, an average of not less than 35 miles a day.

Plaintiff also introduced in evidence a paid repair bill issued by defendant dated April 1, 1946, which shows a speedometer reading of 64,032 miles. In this period of 14 days plaintiff's automobile traveled 604 miles, or an average of 43 miles each day.

Plaintiff's witness Armstrong testified that in August 1946 he drove plaintiff's car to Mackinaw City, Michigan, and back, a distance of about 800 miles, and that during this entire trip plaintiff's car functioned properly. It is a matter of common knowledge that automobiles do not start easily in cold weather and are more difficult to operate in low temperatures. Notwithstanding the alleged defects in his automobile which plaintiff complains of, the fact is that it did travel 946 miles the first month and 640 miles in the 14 succeeding days. It was an old car and therefore could not reasonably be expected to perform with the perfection of a new one. In any event the question whether plaintiff's automobile was in good operating condition at the time of purchase presented an issue of fact for the court to determine. We think that the court could find from the plaintiff's evidence that the automobile in question was in good operating condition as defined in the Maximum Price Regulation 540.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., AND KILEY, J., CONCUR.



Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.



519

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## Abstract

3 36 I.A. 600

Appeal from  
Circuit Court of  
Warren County.

Honorable

William M. Bardens,  
Judge Presiding.

In a proceeding for a writ of scire facias to revive a judgment held by plaintiff against defendants, the circuit court of Warren County, in a trial without a jury, entered a judgment in favor of plaintiff, and defendants appeal therefrom. Plaintiff has filed a cross appeal from that portion of the order allowing defendants a credit of \$60.00 for payments made on the original judgment.

The primary inquiry presented by this appeal is whether the original judgment had been released and satisfied, in which event the issuance of the writ of scire facias was in error; and secondly, whether the attorney allegedly representing plaintiff possessed authority to institute this proceeding.



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• 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673,

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In 1927, the plaintiff corporation, represented by the firm of Lauder and Lauder, of Monmouth, Illinois, obtained a judgment in Warren County against defendants in the sum of \$432.00 and costs. This law firm made unavailing attempts to collect the judgment for several years, until defendants Koletis and Komdat moved to Rock Island and Chicago, respectively.

In 1934, some seven years after the original judgment was entered, the plaintiff corporation allegedly retained attorney William Walker, of Rock Island, to collect the judgment from defendant Koletis, who was residing in that community. Attorney Walker attested that he was requested by mail by the Adsign Corporation of New York to collect this judgment. Payments were made on the judgment over a period of approximately 2 years, and, inasmuch as defendant Koletis was in serious financial straits, attorney Walker, with plaintiff's authority, settled the remainder due on the judgment for a lesser sum, and remitted the money to his client in New York. A release and satisfaction of judgment bearing a date identical to that of the last payment received was executed and delivered to defendant Koletis, but it was not recorded in Warren County inasmuch as defendant no longer resided there. However, when these proceedings were instituted, defendant Koletis sent the release to the Clerk of Warren County, who was also Recorder of Deeds, for filing, but the document was erroneously recorded.

Attorney Walker's statements are corroborated by the testimony of defendant Koletis, and by the introduction in evidence of a cancelled check to the Adsign Studio dated April 24, 1935, with a notation in the corner "Koletis and Komdat", and by numerous entries in attorney Walker's check ledger indicating various sums sent to the Adsign Corporation in the matter of Koletis and Komdat during 1934 and 1935. Inasmuch as attorney Walker had, and still maintains an







extensive commercial practice, involving numerous transactions between business firms, no record of collection cases are kept beyond a period of five years, and, therefore, no further records of this cause, handled by him during 1934 and 1936 were presently available.

Attorney Frederick Lauder, who instituted this proceeding in the name of the plaintiff corporation some 19 years after the original judgment was entered, and over 10 years after it was purportedly settled, denies the employment of attorney Walker by the Adsign Corporation, as well as the execution and legal effect of the release and satisfaction. Attorney Lauder stated in a letter to attorney Walker that his client, the Adsign Corporation, had no record of the matter having been settled. However, it appears from a letter of the New York Secretary of State, offered in evidence, that the Adsign Corporation was dissolved in 1936.

Moreover, from the testimony of attorney Lauder it is admitted that he was not in touch with the Adsign Corporation when he instituted this suit, despite the fact that he filed a sworn affidavit with his pleading, stating that he represented plaintiff. Nor was attorney Lauder in communication with the directors, who, under the New York law are authorized to act for the dissolved corporation to wind up its affairs. In fact, attorney Lauder did not know that the Adsign Corporation was dissolved. He commenced this suit apparently at the instance of some credit agency which forwarded the costs. His right to represent the Adsign Corporation is admittedly predicated solely on the employment, some twenty years before, of the firm of Lauder and Lauder, of which he is the surviving member, in the original cause of action entertained in Warren County.

On the basis of the foregoing facts the circuit court issued the writ of scire facias reviving the judgment, and also denied defendants' motion to dismiss the suit on the







ground that attorney Lauder was without authority to institute the proceeding, for the reason that defendants' motion should have been filed before trial.

For a writ of scire facias to properly issue it must appear that the judgment sought to be revived is in full force and effect. (Galway v. City of Chicago, 207 Ill. App. 304; Turnan v. Temke, 84 Ill. 287.) In the instant case, defendants adduced evidence tending to establish that the judgment entered twenty years before in Warren County was released and satisfied. That the Adsign Corporation did employ attorney Walker, of Rock Island, to collect the judgment in 1934, when defendant Koletis moved to that city, was established even to the satisfaction of the circuit court, which credited defendants with payments made to attorney Walker. This conclusion is predicated on the testimony of attorney Walker to the effect that he was requested by mail by the New York corporation to collect the judgment in 1934; the cancelled check from attorney Walker to the Adsign Studio dated April 24, 1935, bearing the notation "Koletis and Kumdat"; the notations in his old check ledger indicating various sums totalling \$60.00 sent to the Adsign Studio in the matter of Koletis and Kumdat; and by the testimony of defendant Koletis.

The record clearly indicates that attorney Walker was employed to collect this judgment, and payments were made thereon, and in the absence of countervailing circumstances it is reasonable to believe that the claim was settled as represented by him. In the light of the strained financial status of the defendant, and the prevailing economic conditions in 1935, it is not unreasonable that a settlement for a lesser sum than the amount due on the judgment was entered into by the defendant Koletis and attorney Walker acting on







behalf of the Adsign Corporation, particularly since the judgment was over seven years old, and the New York corporation was on the brink of dissolution. Nor does the fact that the release was not immediately recorded by defendant reflect upon the authenticity of its execution, since he no longer resided or did business in Warren County.

Plaintiff's counsel maintains, however, that even if the settlement were in fact entered, it is without legal force and effect inasmuch as attorneys Lauder and Lauder were the attorneys of record for plaintiff, and no formal substitution order was entered.

It is the opinion of this court that the settlement of the original judgment, and the release and satisfaction executed pursuant thereto, were legally binding, for at the time attorney Walker was employed by the Adsign Corporation, the relationship between the New York corporation and the firm of Lauder and Lauder had terminated as a matter of law. The authority of an attorney of record terminates with the entry of judgment, in the absence of special circumstances, and the requirement of a formal order of substitution of attorneys, applies only to substitutions made before, rather than after judgment. (6 C. J. 789). In fact, a party may employ a new attorney to issue execution upon a judgment, or to take any other proceeding for its enforcement without a formal substitution of counsel.

This prevailing rule of law has been followed by the Illinois courts. In *People v. Wos*, 395 Ill. 172, where the court held that notice given to an attorney of record of a motion for a nunc pro tunc order to correct the record after judgment was entered, was insufficient because the relationship of attorney and client had terminated, the court quoted with approval the principles stated in 6 C. J. 672:







"It is always a presumption that an attorney is employed to conduct the litigation to judgment and no further; the relationship of attorney and client, and the general powers of the attorney cease upon the rendition and entry of the judgment."

In the instant case the original judgment was entered and became final in 1927. Therefore, since the conduct of that litigation had terminated, the attorney-client relationship between the firm of Lauder and Lauder and the Adsign Corporation ceased. To insist, as attorney Lauder does in the instant case, that the attorney-client relationship continues indefinitely until a judgment is paid, and that some seven years after the entry of the judgment, the plaintiff, an out-of-state corporation, is obliged to consult its original attorneys and the court in which the judgment was entered for a formal withdrawal and substitution order before it can take legal action to collect the judgment elsewhere, is not only contrary to the established weight of authority, but is a perversion of the canons of legal ethics and the obvious purport of the requirement for substitution orders.

In 1934, plaintiff had a right to authorize attorney Walker, practicing in the county where one of the defendants had moved, to collect the judgment. Attorney Walker was not obliged to enter an appearance in the original cause of action entertained in Warren County some seven years prior thereto, in order to render his acts legally effective. Therefore, the release and satisfaction executed and delivered to defendant Koletis by attorney Walker on behalf of the Adsign Corporation, constituted a bar to the revival of the judgment, and the issuance of the writ of scire facias by the lower court was in error.







It was also reversible error to deny defendants' motion to dismiss the suit on the ground that plaintiff's counsel was without authority to institute the action. As hereinbefore stated, in the absence of special circumstances indicating extended authority, the relationship of attorney and client terminates when a judgment is entered. (*People v. Wos*, supra; 6 C. J. 678-9). Even if the rule were otherwise, and the attorney had the right to proceed to collect the judgment indefinitely, clearly, upon the dissolution of the Adsign Corporation in 1936, whatever vestige of authority the firm of Lauder and Lauder conceivably might have had, was then abrogated. For it is established in Illinois, as well as the majority of jurisdictions, that the death of a client, or the dissolution of a corporation, vacates the power of the attorney, and he is neither required nor authorized to act further. (*Lockemeyer v. Fogarty*, 112 Ill. 572; 6 C. J. 675.)

Although under the laws of New York the directors are authorized to act for, and in the name of, a dissolved corporation in the process of winding up its affairs (*McKinney's Consolidated Laws of New York Annotated*, Book 22, P. 182), attorney Lauder admitted that he had no authority from the directors to commence these proceedings. In fact, he did not know that the corporation was dissolved. This action to revive the judgment was taken by him, apparently at the instance of some New York credit agency which was not apprised of the settlement. Therefore, he cannot be deemed to represent the dissolved Adsign Corporation, and the trial court had power at any stage of the case to question his authority to proceed. (*Pueblo of Santa Rosa v. Fall*, 273 U. S., 316; *Bell v. Farwell*, 189 Ill. 414.) Defendants' motion directing the court's attention to the want of







authority of plaintiff's alleged counsel, tendered during the course of the trial, was reasonably made, and the denial thereof by the circuit court was error.

In accordance with the foregoing analysis, it is our judgment that the circuit court erred in issuing the writ of scire facias inasmuch as the original judgment had been released and satisfied, and that the cause should properly have been dismissed in accordance with defendants' motion. The judgment entered below must, therefore, be reversed with directions to dismiss.

JUDGMENT REVERSED



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body, and the middle of the body, and the  
In accordance with the findings, it is the  
judgment that the evidence is not sufficient to  
at this time to show a violation of the law  
relatives and relatives, and the middle of the  
have been found to be in violation of the law.  
The judgment is that the evidence is not  
sufficient to show a violation of the law.

THE JUDGE



Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1949.

General No. 9626

Agenda No. 10

Orval F. Barnett,  
Plaintiff-Appellee,  
-vs-  
Letha Barnett,  
Defendant-Appellant.)

Appeal from the

Circuit Court of

Sangamon County, Illinois.

336 I.A. 601

DADY, P.J.

This appeal is by Letha Barnett, hereafter referred to as appellant, from an order in a divorce proceeding which denied her further alimony, and in effect denied her interest on unpaid installments of support money for minor children.

On December 1, 1927, appellant obtained a divorce in the Circuit Court of Sangamon County from appellee, Orval F. Barnett. The decree ordered that the custody of two minor children be given appellant, and that on the entry thereof appellee pay appellant \$500 for her use and benefit, and \$55 per month ~~in equal installments of \$5.00 on the first day of each month thereafter~~ for the support of herself and the two minor children until the further order of the court.

On November 3, 1930, appellee filed in said cause a petition which in substance stated that in accordance with said decree he did pay to appellant such \$500 and, according to his best ability, did pay said alimony, that he fell in arrears in his alimony payments, that one of said children was married and living with



Corrected

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1929.

Record No. 10

Serial No. 2483

3361.4.603

Circuit Court of

Franklin County, Illinois.

Plaintiff-Appellee,  
vs.  
Defendant-Appellant.

Page 1.

This appeal is by Jacob Barnett, hereafter referred to as appellant, from an order in a divorce proceeding which denied her alimony, and in which denied her interest in certain real estate and money for minor children.

On December 1, 1927, appellant obtained a divorce in the Circuit Court of Franklin County from appellee, Grace E. Barnett. His decree ordered that the custody of two minor children be given to appellee, and that on the entry thereof appellee pay appellant \$200 per month for her use and benefit, and \$25 per month for the support of the minor children. Appellant for the support of the minor children and the two minor children until the further order of the court.

On November 2, 1928, appellee filed in said cause a petition which in substance stated that in accordance with said decree he did pay to appellant such \$200, and, according to his best ability, he paid alimony, that he fell in arrears in his alimony payments, that one of said children was married and living with



and supported by her husband and that the other of said children was residing with petitioner and had been for a number of months, that appellee had made an amicable settlement and adjustment with appellant for the sum of \$450 as settlement in full of all claims of every kind or nature, including all alimony due or to become due, and in lieu of all claims in regard to the right of homestead and dower. The petition asked that appellee be discharged from further payment of any money for the benefit of appellant or said children.

On the same day there was filed an answer to such petition purporting to bear the signature of appellant, and of A. G. Ginnaven as her solicitor, which stated that she admitted each and all of the allegations of the petition, that she had made settlement in full with appellee for all claims for alimony which she then had or might thereafter have, and that appellee had paid to her \$450 in consideration of such settlement and waiver of all claims and in full of all claims and rights which she theretofore might have had or might thereafter have in the nature of homestead or dower.

On the same day an order was entered which stated that the court had heard the testimony on behalf of the parties, that it appeared to the court that appellee had made an amicable settlement with appellant and paid her \$450. in full of all claims on account of any alimony provided for in said decree and in consideration that she waive all rights and claims of dower or homestead which she then had or might thereafter have, and that she no longer had any of said children dependent on her for support. Such order then ordered that appellee be discharged from the payment of all money and alimony for the benefit of appellant, and that he be discharged from further



and supported by her husband and that the other of said children  
was residing with petitioner and had been for a number of months,  
that appellee had been an excellent mother and had been very  
affectionate for the son of said deceased in fact of all children  
of every kind of nature, fact that all children were in her home  
and in fact of all children in regard to the right of inheritance  
and dower. The petition asked that appellee be dispossessed from  
inheritance of the house for the benefit of said children and  
children.

On the same day there was filed in court an answer to said petition  
purporting to bear the signature of appellee and of A. J. Johnson  
as her solicitor, which stated that she and said son and all of the  
alliances of the petition, that she had made settlement in 1909  
with appellee for all claims for money which she then had or  
right thereafter have, and that appellee had said to her that in  
consideration of such settlement and waiver of all claims and in  
full of all claims and rights which the deceased's estate had  
had or right thereafter have in the nature of settlement or payment  
on the same day an order was entered which said that the court  
had heard the testimony on behalf of the petition, and it appeared  
to the court that appellee had been an excellent mother and  
affectionate and paid her \$400 in full of all claims on account of  
any claims provided for in said decree and in consideration that  
she waive all rights and claims of dower or inheritance which she then  
had or right thereafter have, and that she no longer had any of  
said children dependent on her for support. Such order then ordered  
that appellee be dispossessed from the house of all money and claims  
for the benefit of appellee, and that he be dispossessed from further



payment of any money for the benefit of appellant or any of said children, and that appellant should have no right of dower or homestead in any property of appellee which he then had or might thereafter have.

On January 7, 1931, an order was entered which stated that the appellant then came by her solicitor and that such solicitor filed a petition to vacate the order of November 3, 1930.

The clerk of the trial court has certified that a copy of such petition does not appear in the files and appears to be lost and that no copy is obtainable.

On June 8, 1931, an order was entered which stated that the "parties" were present in court and by their solicitors, and that by agreement the cause was to be heard on the petition to vacate the order of November 3, 1930, without the formality of an answer being filed. Such order found that on November 3, 1930, the court entered an order "by agreement of the parties through their respective counsel that" appellee "pay to" appellant \$450, "the same to be in full settlement of all alimony which was then due and in payment of future alimony which might accrue," that such order of November 3, "was a broader and more comprehensive order than should have been entered and consequently was inadvertently entered without regard to the fact there were still minor children awarded to" appellant "who are now dependent on her," that appellee should contribute toward the support of said two children and "that the order \* \* \* entered \* \* \* on November 3, 1930, in settlement of all questions of alimony, should be set aside and declared of no effect so far as further alimony is concerned, but should



payment of any money for the benefit of appellant or any of said children, and that appellant should have no right of access to same, and in any property of appellant which he then had or might thereafter have.

On January 7, 1901, an order was entered which stated that the appellant then came by her solicitor and took away certain things, a petition to vacate the order of November 2, 1900.

The clerk of the trial court was notified that a copy of same petition does not appear in the files and appears to be lost and that no copy is obtainable.

On June 2, 1901, an order was entered which stated that the "petition" was present in court and by both solicitors and that by agreement the same was to be heard on the petition to vacate the order of November 2, 1900, without the testimony of an witness being filed. Such order was made on November 1, 1901, the court entered an order "by agreement of the parties" which was substantially as follows: "The court hereby orders that the appellant pay to the respondent the sum of \$1000."

be in full satisfaction of all claims which she may have in the future or future claims which might accrue." This order was entered on November 1, 1901, and was a proper and a constructive order that should have been entered and accordingly it was immediately entered without regard to the fact that said child was not a party to the "petition" who was not dependent on her, that said child should contribute toward the support of said two children and "that the order" was entered on November 2, 1900, in satisfaction of all questions of alimony, should be set aside and declared of no effect so far as further alimony is concerned, but should



remain in full settlement as to all alimony which was past due upon that date." The order of June 8, 1931, then ordered that the order of November 3, 1930, "be and remain a full settlement of all questions of alimony between the parties hereto up to and including May 31, 1931, that said order as to future payments of alimony be and the same is hereby set aside and declared of no effect." The order then ordered that appellee pay to appellant for the use of said minor children \$25 per month until the further order of the court, said payments to begin July 15, 1931. Such order of June 8, 1931, contained and made no specific provision whatever as to the payment of future alimony.

So far as the record shows, no further proceedings were had in said cause until October 20, 1947, when appellant filed a petition which stated that the "court had no jurisdiction to enter said order of November 3, 1930, in so far as it related to any past due alimony that was due petitioner," that only one payment of \$25 had been made by appellee for the support of the children and that appellee had in all other respects failed to comply with the terms of said orders, that appellant had supported said children until they became of age with sums of money in excess of the amounts provided in said orders and was entitled to be reimbursed therefor and for all alimony that was due as of the date of the order entered November 3, 1930, that appellant at the time of filing the petition was aged 55 years and destitute and had never remarried, and that appellee was at the time of the entry of such orders without substantial property, but that at the time of the filing of said petition was a man of substantial property, having a net worth of approximately \$100,000 and an income of \$1,000 per month.



...in 1911 settlement as to all alimony which was paid the  
prior that date." The order of June 6, 1931, then ordered that the  
order of November 2, 1930, "be and remain a null and void" and all  
questions of alimony between the parties hereto be to and including  
July 31, 1931, that said order be and future payments of alimony be  
and the same is hereby set aside and declared of no effect. The  
order then ordered that appellee pay to appellant for the use of  
said minor children \$25.00 per month until the further order of the  
court, said payments to begin July 15, 1931. Such order of June  
6, 1931, contained and made no specific provision whatever as to  
the payment of future alimony.

So far as the record shows, no further proceedings were had in  
said cause until October 20, 1937, when appellant filed a petition  
which stated that the "court had no jurisdiction to enter said  
order of November 2, 1930, in so far as it related to the said  
alimony that was due and payable," and only the payment of \$25.00  
had been made by appellee for the support of the children and that  
appellee had in all other respects failed to comply with the terms  
of said order, that appellee had suggested said children until they  
became of age with sums of money in excess of the amounts provided  
in said order and was entitled to be reimbursed therefor and that  
all alimony that was due as of the date of the order entered November  
2, 1930, that appellee at the time of filing the petition was aged  
25 years and destitute and had never remarried, and that appellee  
was at the time of the entry of such order without substantial  
property, but that at the time of the filing of said petition was a  
owner of substantial property, having a net worth of approximately  
\$100,000 and an income of \$1,000 per month.



Such last petition asked that the order of June 6, 1931, be modified so as to provide that appellee pay appellant alimony of \$300. a month from the date of any order entered on such petition, that appellee be ruled to show cause why he should not be in contempt of court in failing to comply with the order of June 6, 1931, and that said orders of November 3, 1930, and June 6, 1931, be modified in so far as they or either of them purported to settle petitioner's right to receive alimony that was due as of November 3, 1930.

On February 20, 1948, such petition was amended so as to ask for judgment for the amount due for support of the children plus interest from time installments became due.

On February 17, 1948, appellee filed his answer in which he stated he was never served with any summons or notice previous to the time the order of June 6, 1931, was entered, denied appellant was entitled to any money for the support of the children, and stated that appellant was barred from any right to alimony because of her acceptance of the sum of \$450 in full payment of alimony, and denied that appellant was destitute, but alleged that she had property.

On March 1, 1948, the court heard the testimony of appellant as to her support of the children, and her health, financial condition and general status since the entry of the divorce decree, but refused her offer of corroborating testimony on such subject, and refused her offer to prove that the order of November 3, 1930, was entered without her knowledge or consent, that the answer filed November 3, 1930, did not bear her genuine signature, that she was not advised by her attorney Ginnaven or any one of the supposed agreement with reference to alimony, that she received \$395, ~~==~~ being \$450 ~~as~~ less



Such last petition asked that the order of June 8, 1931, be modified so as to provide that appellee pay appellant attorney's fees a month from the date of any order entered on such petition, that appellee be held to show cause why he should not be in contempt if he failed to comply with the order of June 8, 1931, and that said order of November 3, 1930, and June 8, 1931, be modified in so far as they or either of them purported to grant appellee's right to receive attorney's fees as of November 3, 1930.

On February 20, 1932, such petition was amended so as to ask for judgment for the amount due for payment of the children's plus interest from the time the same became due.

On February 17, 1932, appellee filed his answer in which he stated he was never served with any summons or notice to appear at the time the order of June 8, 1931, was entered, denied appellant was entitled to any money for the support of the children, and stated that appellant was barred from any right to attorney's fees of her acceptance of the sum of \$250.00 in full payment of all claims, and denied that appellant was defrauded, but alleged that she had property.

On March 1, 1932, the court heard the testimony of appellants as to her support of the children, and her position, financial condition and general status since the entry of the divorce decree, but refused her offer of corroborating testimony on each subject, and refused her offer to prove that the order of November 3, 1930, was entered without her knowledge or consent, that the answer filed November 3, 1930, did not bear her genuine signature, that she was not advised by her attorney (whether or not one of the witnesses) with reference to attorney's fees, that she received \$250.00 from the last



certain expenses, through Ginnaven with the understanding it was a partial payment and that the whole past due alimony would be forthcoming, that she was not in court on June 6, 1931, and had no knowledge of what took place in court on that day, and that she never saw and was never advised of the order of November 3, 1930, or the order of June 6, 1931, until "recently." Appellee offered no evidence.

On March 3, 1948, the court entered an order finding, among other things, that the younger of such two children attained legal majority on October 12, 1936, that the legal effect of the orders entered on November 3, 1930 and June 6, 1931, was to bar appellant forever from all claims and alimony for her own support and maintenance after June 6, 1931, and that therefore appellant was not entitled to any alimony for her own support and maintenance "regardless of any proof or offer of proof on her part, either of a change in her circumstances or of a change in the circumstances of Orval F. Barnett." The order further found that appellant by her failure from June 6, 1931, until the filing of her petition in the fall of 1947, to take any action, was barred from showing that the order of November 3, 1930, was obtained by fraud without her knowledge or consent, or that her attorney who signed her name to the answer to the petition which was then made the grounds for said order, had no authority to negotiate or enter into the settlement purported to be embodied in said "order," and that by reason of laches <sup>appellant</sup> ~~appellee~~ was barred from showing the circumstance and conditions existing at the time of the entry of such order of July 6, 1931. The order then ordered that judgment be entered against appellee and in favor of appellant for \$1600, together with



On March 2, 1933, the Court rendered its decision in the case of *United States v. United Fruit & Sugar Corp.*, 295 U.S. 155, 55 S.Ct. 161, 75 L.Ed. 369. The Court held that the Government's complaint against the United Fruit & Sugar Corporation was barred by the statute of limitations. The Court stated that the complaint was filed on March 2, 1933, and that the cause of action accrued on March 2, 1932. The Court held that the complaint was barred by the statute of limitations because it was filed more than one year after the cause of action accrued.



\$200. attorney's fees, in full payment of all support money for the support of said minor children, and ordered that appellant be forever barred from any right of alimony for her support and maintenance after June 6, 1931, and that her petition to modify the order of June 6, 1931, and pay her alimony for her support and maintenance be denied. ✓

On March 8, 1948, appellee paid to the clerk of the court the \$1800 ordered to be paid by the order of March 3, 1948.

The first contention of appellant is that the court erred in not ordering appellee to pay interest at five per cent per annum on each installment, as it became due, of child support, going to make up the \$1800 that he was in arrears for the support of the children.

Appellee contends that this question of the allowance of interest was not raised or urged in the trial court and therefore cannot be first raised in this court. The amendment filed February 20, 1948, specifically asked for the allowance of interest. The order of March 3, 1948, did not mention interest, but in legal effect denied the allowance of interest. There is nothing in the record to indicate that in the trial court appellant waived the allowance of interest. Therefore we believe the question of interest is properly presented for review.

The order of June 6, 1931, awarding <sup>appellant</sup> ~~appellee~~ \$25 ~~==~~ per month for the support of the children, was a money decree, and as such bore interest at five per cent per annum until satisfied. (Harding v. Harding, 180 Ill. 592; Wadler v. Wadler, 325 Ill.App. 83.) In Kaifer v. Kaifer, 286 Ill.App. 433, 440, the court said:



1900. Attorney's fees, in full payment of all support money for the support of said minor children, and ordered that appellant be forever barred from any right of attorney for her support and maintenance after June 8, 1901, and that her petition be dismissed the order of June 8, 1901, and any hearing for her support and maintenance be denied.

On March 3, 1902, appellant said to the clerk of the court the 1900, ordered to be paid by the order of March 3, 1902. The first condition of appellant is that the court order is not ordering, appellant to pay interest on the 1900, and on each installment, as it became due, of said support, until to make up the 1900, that he was in arrears for the support of the children.

Appellee contends that this question of the allowance of interest was not raised or argued in the trial court and therefore cannot be first raised in this court. The respondent filed February 2, 1902, specifically asked for the allowance of interest. The order of March 3, 1902, did not mention interest, but in April appellant stated the allowance of interest. There is nothing in the record to indicate that in the trial court appellant asked the allowance of interest. Therefore he believes the question of interest is properly presented for review.

The order of June 8, 1901, awarded appellant \$100 per month for the support of the children, was a money decree, and as such bore interest at five per cent per annum until satisfied. (Citing v. Harding, 130 Ill. 202; Waller v. Waller, 132 Ill. 401, 62.) In Waller v. Waller, 131 Ill. App. 400, 401, the court said:



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"The rule<sup>^</sup> is to allow interest where warranted by equitable considerations, and to refuse such allowance when it does not comport with justice." It is our opinion that no equitable reason appears in the record showing or tending to show that appellant should not receive or be entitled to such interest.

The next contention of appellant is that the court erred in holding that the legal effect of the orders of November 3, 1930, and June 6, 1931, was to bar appellant from claiming alimony after June 6, 1931.

When the divorce decree was entered the then statute (Sec. 18, Ch. 40, <sup>Ill.</sup> Rev. Stats. 1927) provided that "When a divorce decree shall be entered the court may make such order touching the alimony and maintenance of the wife \* \* \* as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; \* \* \* And the court may, on application, from time to time, make such alterations in the allowance of alimony \* \* \* as shall appear reasonable and proper." Such statute was enacted in 1874, and, so far as is material to the present issues, there was no change in such statute until 1947.

By an act approved July 9, 1947, (Ch. 40, Sec. 18, <sup>Ill.</sup> Rev. Stats. 1947) the statute on alimony was amended to provide that "Irrespective of whether the court has or has not in its decree made an order for the payment of alimony \* \* \* it may at any time after the entry of a decree for divorce \* \* \* make such order for alimony and maintenance of the spouse \* \* \* as from the evidence and nature of the case shall be fit, reasonable and just, but no such order/subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony \* \* \* or where the court, by its decree, <sup>has</sup> denied alimony."



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"The rule is to allow interest where warranted by justice and equity, and to refuse such allowance when it does not comport with justice." It is our opinion that no equitable reason appears in the record showing or tending to show that appellant should not receive or be entitled to such interest.

The next contention of appellant is that the court erred in holding that the legal effect of the order of November 3, 1930, and June 3, 1931, was to bar appellant from claiming alimony after June 3, 1931.

When the divorce decree was entered the then statute (Sec. 18, Ch. 40, Rev. Stat. 1927) provided that "When a divorce decree shall be entered the court may make such order touching the alimony and maintenance of the wife \* \* \* as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; \* \* \* And the court may, on application, from time to time, make such alterations in the allowance of alimony \* \* \* as shall appear reasonable and proper." Such statute was amended in 1934, and, so far as is material to the present issues, there was no change in such statute until 1947.

By an act approved July 3, 1947, (Ch. 40, Sec. 18, Rev. Stat. 1947) the statute on alimony was amended to provide that "Irrespective of whether the court has or has not in the divorce made an order for the payment of alimony \* \* \* it may at any time after the entry of a decree for divorce \* \* \* make such order for alimony and maintenance of the spouse \* \* \* as from the evidence and nature of the case shall be fit, reasonable and just, but no such order shall be made unless the decree may be made in any case in which the decree recites that there has been an express waiver of alimony \* \* \* or where the court, by its decree, denied alimony."



A statute will be deemed to operate prospectively only, and will not be presumed to have retroactive operation unless the language employed is so clear that it will admit of no other construction. (Anderson v. Board of Education, 390 Ill. 412, 430.) A judgment is a vested right of property and cannot be destroyed or diminished by a retroactive statute. (Arnold<sup>or</sup> Murdock Co. v. Industrial Commission, 314 Ill. 251, 255; Smolen v. Industrial Commission, 324 Ill. 32.)

It is our opinion that such act of 1947 was not intended to be and is not retroactive. Therefore the rights of appellant and appellee on the question of alimony, must in our opinion be determined by the law in force prior to the 1947 amendment.

Before such amendment of 1947, it appears to have been settled law that if in granting a divorce the trial court neither expressly reserved jurisdiction over the question of alimony, nor granted alimony, then such court lost jurisdiction of the subject matter of alimony. (Kelley v. Kelley, 317 Ill. 104; Smith v. Johnson, 321 Ill. 134.) Where a decree of divorce awards a sum in gross for or in lieu of alimony the decreewill be regarded as final, and the gross sum, when paid, will operate as a discharge and satisfaction of all claims for ~~former~~<sup>future</sup> support by the wife. (Maginnis v. Maginnis, 323 Ill. 113, 117.) When a husband and wife agree upon alimony the court will embody the agreement in its decree, and such decree will thereafter conclude the parties (Smith v. Smith, 334 Ill. 370, 378),- except as to parties remarrying while receiving alimony. (Back<sup>N</sup> v. Back, 322 Ill.App. 369.)



... will be deemed to operate retrospectively only, and  
will not be presumed to have retrospective operation unless the  
language employed is so clear that it will admit of no other  
construction. (Robinson v. Board of Education, 200 Ill. 410, 420.)  
A judgment is a vested right of property and cannot be retroactively  
or distinguished by a retrospective statute. (Amold v. Amold, 200 Ill. 410, 420.)  
Industrial Commission v. Industrial Union, 211 Ill. 201, 202; Industrial  
Commission, 200 Ill. 410.

It is our opinion that such act of 1947 was not intended to be  
and is not retrospective. Therefore the right of acquisition and application  
on the question of alimony, now is our opinion is determined by the  
law in force prior to the 1947 amendment.

Before such amendment of 1947, it appears to have been settled  
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reserved jurisdiction over the question of alimony, nor granted  
alimony, then such court lost jurisdiction of the subject matter  
of alimony. (Miller v. Miller, 211 Ill. 100; Miller v. Miller,  
221 Ill. 184.) Where a decree of divorce awards a wife an amount for  
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gross sum, when paid, will operate as a discharge and satisfaction  
of all claims for <sup>future</sup> ~~present~~ support of the wife. (Miller v. Miller,  
221 Ill. 112, 117.) When a husband and wife agree upon alimony the  
court will embody the agreement in its decree, and such decree will  
thereafter conclude the parties (Miller v. Miller, 221 Ill. 112, 117).  
except as to parties receiving alimony. (Miller v. Miller,  
221 Ill. 112, 117.)



The order of June 6, 1931, found that the order of November 3, 1930, was entered by agreement of the parties. Under the above authorities, if the order of November 3, 1930, was in fact entered by agreement of the parties, then such order, by itself, would appear to have been a final order so far as alimony was concerned, fully discharging appellee from the payment of any future alimony. However, the order of June 6, 1931, was entered with the parties appearing in person and by their attorneys, and was not appealed from. Assuming that the court had jurisdiction to enter such order of June 6th, the question then is, what was the effect of such order in ordering that the order of November 3, 1930, be and remain a settlement of alimony to May 31, 1931, and in ordering that that part of the order of November 3, 1930, as to future payments of alimony be set aside, and that appellee pay appellant \$25. per month for the future support of the children?

The orders of December 1, 1927, and June 6, 1931, are inconsistent and conflicting in that the order of December 1, 1927, ordered appellee to pay \$55 per month for the support of appellant and the children, while the order of June 6, 1931, ordered that he pay her \$25 per month for the support of the children only, but made no specific provision whatever for the payment of alimony. Certainly it was not the intention of the court, or meaning of the order of June 6, 1931, that appellee should pay appellant \$55 per month for the support of herself and children as provided by the order of December 1, 1927, plus the further sum of \$25 per month for the support of the children as provided for by the order of June 6, 1931, and appellant makes no such contention.



The order of June 8, 1931, found that the order of November 3, 1930, was entered by agreement of the parties. Under the above authorities, if the order of November 3, 1930, was in fact entered by agreement of the parties, then such order, by itself, would appear to have been a final order so far as alimony was concerned, thereby discharging appellee from the payment of any future alimony. However, the order of June 8, 1931, was entered with the parties continuing in seque and by their attorneys, and was not appealed from. Assuming that the court had jurisdiction to enter such order of June 8th, the question then is, what was the effect of such order in ordering that the order of November 3, 1930, be and remain a continuing order of alimony to July 31, 1931, and in ordering that that part of the order of November 3, 1930, as to future payments of alimony be set aside, and that appellee pay appellant \$25 per month for the support of the children?

The orders of December 1, 1937, and June 8, 1931, are inconsistent and conflicting in that the order of December 1, 1937, ordered appellee to pay \$25 per month for the support of appellant and the children, while the order of June 8, 1931, ordered that he pay her \$25 per month for the support of the children only, but made no specific provision whatever for the payment of alimony. Certainly it was not the intention of the court, or members of the order of June 8, 1931, that appellee should pay appellant \$25 per month for the support of herself and children as provided by the order of December 1, 1937, plus the further sum of \$25 per month for the support of the children as provided for by the order of June 8, 1931, and appellee makes no such contention.



It is our opinion that, construing the order of June 6, 1931, in connection with all prior orders, the intent and effect of the order of June 6, 1931, was that appellant was to receive no alimony after the entry of such last order. Evidently the parties so construed and acted on such last order for no further alimony was paid and none was requested until the expiration of 16 years, and, when then asked for, alimony was not asked for the preceding 16 years, but only as to the future.

Being of such opinion, it is our further opinion that the order of June 6, 1931, was a final order on the question of the allowance of alimony, and that after the entry of such order the court had lost jurisdiction to further consider the allowance of future alimony.

Appellant's next contention is that the court erred "in denying appellant an opportunity to present evidence in support of her prayer for modification."

So far as the record shows not until the lapse of about 16 years did appellant raise any question as to the right of Attorney Ginnaven to enter any appearance and, in effect, consent to the entry of the order of November 3, 1930.

In view of the fact that the orders of November 3, 1930, and June 6, 1931, were matters of record in a proceeding to which appellant was a party, and in which she was, of course, vitally interested, in view of the lapse of about 16 years after the entry of the order of June 6, 1931, before she filed her present petition, the fact that the order of June 6, 1931, recited that the "parties" were present in court at the time of the entry of such order and found that the order of November 3rd was entered "by agreement



It is our opinion that, considering the order of June 8, 1951, in connection with all prior orders, the intent and effect of the order of June 8, 1951, was that appellants were to receive an allowance after the entry of such last order. Undoubtedly the parties so contended and acted on such last order for no further action was taken and none was requested until the expiration of 12 years, and when they asked for, appellants were not asked for the preceding 12 years, but only as to the future.

Being of such opinion, it is our further opinion that the order of June 8, 1951, was a final order on the question of the allowance of attorney's fees and that after the entry of such order the parties had no jurisdiction to further consider the allowance of future attorney's fees. Appellants' next contention is that the court acted in denying appellants an opportunity to present evidence in support of their prayer for modification.

So far as the record shows that the issue of attorney's fees did appellants raise any question as to the right of attorney's fees to enter any appearance and in effect, counsel for the party of the order of November 2, 1950.

In view of the fact that the order of November 2, 1950, and June 8, 1951, were matters of record in a proceeding in which appellants were a party, and in which the law, of course, was fully interpreted, in view of the lapse of about 12 years after the entry of the order of June 8, 1951, parties were final and present parties, the fact that the order of June 8, 1951, related that the parties were present in court at the time of the entry of such order and found that the order of November 2, 1950, was entered by agreement



of the parties through their respective counsel," and in view of all of the circumstances of the case, it is our opinion that the trial court did not err in refusing to admit or consider the offer of proofs questioning the validity of the orders entered on November 3, 1930, and June 6, 1931, and did not err in refusing to admit or consider further evidence as to any change in the status of the parties after the entry of such last order.

The order of March 3, 1948, is affirmed in all respects, except that part thereof which failed to allow appellant interest on unpaid installments of support money for the children as the same became due, as to which excepted part the judgment is reversed and remanded for further proceedings consistent with this opinion.

Affirmed in part and reversed in part  
and remanded for further proceedings  
consistent with this opinion.



of the parties through their respective counsel, and in view of  
all of the circumstances of the case, it is our opinion that the  
trial court did not err in refusing to admit or consider the other  
of facts questioning the validity of the orders entered on December  
2, 1935, and June 2, 1937, and did not err in refusing to admit or  
consider further evidence as to any change in the status of the  
parties after the entry of such last order.

The order of March 2, 1942, as modified in all respects, except  
that part thereof which relates to child support, is hereby affirmed on appeal.  
Instalments of support money for the children of the wife herein  
due, as to which exception was taken, are reversed and  
remanded for further proceedings consistent with this opinion.

Affirmed in part and reversed in part  
and remanded for further proceedings  
consistent with this opinion.



Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

A

General No. 9636.

February Term, A.D.1949

Agenda No. 18

LORENE HEMPHILL, RALPH A. )  
HEMPHILL and UVA B. HEMPHILL, )  
Plaintiffs-Appellants, )  
-vs- )  
FRANK MILLER and STELLA MILLER, )  
Defendants-Appellees. )

Appeal from

Circuit Court of

Jersey County.

336 I.A. 601<sup>2</sup>

DADY, P.J.

This automobile collision case was brought by the plaintiffs-appellants Lorene Hemphill, Ralph A. Hemphill and Uva B. Hemphill against the defendants-appellees Frank Miller and Stella Miller, for personal injuries and property damage.

Stella Miller filed a counter-claim for property damage in which she alleged her husband Frank Miller, as her agent, was driving a car owned by her.

The jury's verdict found the defendants and counter-defendants not guilty. Plaintiffs motion for a new trial was denied and, on such verdicts, judgment was entered against the plaintiffs and against the counter-claimant. The plaintiffs bring this appeal.

Each count of the complaint alleged that Ralph A. Hemphill was driving "his" automobile northerly on Lafayette Street with all due care for the safety of himself and his automobile, and while his wife and daughter were using all due care for their own safety. The negligence charged in each count of the complaint was that Frank Miller drove the Miller car at a dangerous and reckless rate of speed,



Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

Case No. 12

February Term, A.D. 1949

General No. 2232

Appel from  
Circuit Court of  
Jesse County.

LOUIS HENRI, JR.,  
PAMELLA and DAVID HENRI,  
Plaintiffs-Appellants,  
vs.  
JESSE HENRI and STELLA HENRI,  
Defendants-Appellees.

388 LA 501

This cause came on for trial in the Circuit Court of Jesse County, Illinois, on the 12th day of January, 1949, and was heard by the Honorable Judge J. H. Smith, who rendered judgment in favor of the plaintiffs, and against the defendants, for personal injuries and property damage. The jury found the defendants liable for personal injuries and property damage to the plaintiff, and awarded damages in the sum of \$10,000.00. The plaintiff, Stella Henri, filed a counter-claim for personal injuries and property damage to her car, which she alleged her husband, Jesse Henri, was driving at the time of the collision, and which was owned by her. The jury's verdict found the defendants and counter-defendants not guilty. Plaintiff's motion for a new trial was denied, and on such verdict, judgment was entered against the plaintiffs and against the counter-claimant. The plaintiffs bring this appeal. Each count of the complaint alleged that Ralph A. Henrich was driving "this" automobile northwesterly on Lafayette Street with all due care for the safety of himself and his automobile, and while his wife and daughter were using all due care for their own safety. The negligence charged in each count of the complaint was that Frank Miller drove the Miller car at a dangerous and reckless rate of speed,



without warning, against and into the Hemphill car. The answer of the defendants denied all negligence and alleged that Ralph A. Hemphill was driving the Hemphill car in his own right and as agent of Uva B. Hemphill.

The collision occurred on Sunday, August 18, 1946, about 10:00 A. M. in the intersection of Arch and Lafayette Streets, in the City of Jerseyville. Ralph A. Hemphill was driving north on Lafayette Street in a car owned by him, his wife, <sup>Uva B. Hemphill</sup> and daughter Lorene, but such car was registered in his wife's name. He was accompanied by his wife Uva and ~~xxx~~ daughter. ~~xxxxxxx~~ His wife was sitting in the center of the front seat and the daughter on her right. Frank Miller, unaccompanied by any one, was driving his car west on Arch Street. The Miller car struck the right rear fender of the Hemphill car. The force of the collision turned the Hemphill car around. Mrs. Hemphill and the daughter were thrown from the car to the pavement.

The weather was clear and the pavement was dry. There was no stopsign on either street. The width of the streets is not shown. At the southeast corner of the intersection there was located a house which was about 30 feet from the east edge of Lafayette Street.

Ralph A. Hemphill testified that he and his wife and daughter were driving from Hartford, Ill., to Pleasant Hill, Ill., to see his father and sisters and to see his wife's sister, that the Hemphill car was going about 15 miles per hour as he approached and entered the intersection and he did not slacken his speed, that when about 15 feet from the intersection he saw the Miller car when it was about 67 steps to the east, that when he started across the intersection the Miller car was then about 37 steps, "better than" 100 feet, from the







intersection, that Miller was then going at a "pretty fair speed," faster than the Hemphill car, that he thought he had plenty of time to get across and continued to drive on at the same speed and was "nearly across the intersection," with his front wheels about even with the north curb of Arch Street, when hit.

Mrs. Hemphill received a brain concussion and was severely injured in the collision. Lorene Hemphill received no severe injury, but was bruised and her clothing was damaged. The Hemphill and Miller cars were damaged.

Mrs. Hemphill testified that she did not remember leaving home and did not recall anything that happened on the day in question.

Lorene Hemphill testified that her father was going about 15 miles per hour, that she was not watching up or down the side streets but was just sitting there as a passenger, that she saw the Miller car coming but did not know how far it was away or its speed, that she was not watching the intersection and didn't remember much about the accident, and that her father made no attempt to slow down or turn.

The defendant Frank Miller testified that he was going about 15 miles per hour, that he was "just entering the intersection when this car flashed out in front of me and we hit just about the center of the intersection," that as he went into the intersection "I looked right first and before I had a chance to do anything else I didn't see this car until I was right in front of it," that he did not see the Hemphill car until it was right in front of him, 12 or 15 feet away, that he put on his brakes and turned to the right a little, but that the bumper and grill of his car struck the right rear fender of the Hemphill car at a time when the right front wheel of the Miller car was about four feet from the north



intersection, that Miller was then going at a pretty fair speed, faster than the Humphill car, that he thought he had plenty of time to get across and continued to drive on at the same speed and was nearly across the intersection, with his front wheels about even with the north curb of Arch Street, when hit.

Mrs. Humphill received a brain concussion and was severely injured in the collision. Person Humphill received no severe injury, but was bruised and her clothing was damaged. The Humphill and Miller cars were damaged.

Mrs. Humphill testified that she was not in her car leaving home and did not recall anything that happened on the day in question. Irene Humphill testified that her father was going about 15 miles per hour, that she was not watching up on door the whole time but was just sitting there as a passenger, that she saw the Miller car coming but did not know how far it was away or how close, that she was not watching the intersection and didn't remember much about the accident, and that her father made no attempt to slow down or turn.

The defendant Frank Miller testified that he was going about 15 miles per hour, that he was "just watching the intersection when this car flashed out in front of me and he hit me about the center of the intersection," that as he went into the intersection "I looked right first and then I had a chance to go any other way I didn't see this car until I was right in front of it," that he did not see the Humphill car until it was right in front of him, 15 or 16 feet away, that he put on his brakes and turned to the right a little, but that the bumper and grill of his car struck the right rear fender of the Humphill car at a time when the right front wheel of the Miller car was about four feet from the north



curb of Arch Street.

William Bartlett testified that he was driving a truck west on Arch Street at a speed of 10 or 12 miles an hour, that when nearing Lafayette Street the Miller car passed the truck at a speed of about 15 miles per hour, and that he did not see but only heard the collision.

The first contention is that the verdict is against the manifest weight of the evidence. It is our opinion that we cannot properly say such is the case. While in our opinion the jury might properly have found Miller guilty of actionable negligence, we also believe the jury could properly have found that the occupants of the Hemphill car either were or were not guilty of such contributory negligence as to bar a recovery by them.

Complaint is made as to certain given instructions. We do not consider the particular criticisms justify setting up the instructions in haec verba or in substance, but consider it sufficient to say that while we are not approving the given instructions, it is our opinion that there is no merit to the criticisms made to any of them.

On cross examination of Frank Miller by counsel for plaintiffs he was asked, "Did you have any conversation with Mr. Hemphill at that time?" and he replied, "Mr. Hemphill walked up and wanted to know if I had insurance and I told him I did." Thereupon the plaintiffs moved that a juror be withdrawn and a mistrial declared. We do not consider there is any merit to the contention that such answer was prejudicial to the plaintiffs.

During the closing argument of the attorney for the plaintiffs a spectator in the court room made a loud remark as to some figure, either "\$8,000 or \$18,000." Complaint is made that <sup>the effect of</sup> "this outburst" was to distract the attention of the jury from the business and



June 22, 1902

William Hartst testified that he was driving a truck west

on Main Street at a speed of 10 or 12 miles an hour, that when

passing Lafayette Street the Miller car passed the truck at a speed

of about 15 miles per hour, and that he did not see any other car

the collision.

The first contention is that the verdict is against the plaintiff

weight of the evidence. It is our opinion that we cannot properly

say such is the case. While in our opinion the jury might properly

have found Miller guilty of actionable negligence, we also believe

the jury could properly have found that the negligence of the plaintiff

was either more or less than that of such contributory negligence

as to bar a recovery by them.

Complaint is made as to certain given instructions. We do not

consider the particular criticisms justly. Setting up the testimony

in these words or in substance, but consider it sufficient to say that

while we are not approving the given instructions, it is our opinion

that there is no merit to the criticisms made to any of them.

On cross examination of Frank Miller by counsel for plaintiff

he was asked: "Did you have any conversation with Mr. Beaphill at

that time?" and he replied, "Mr. Beaphill called up and wanted to know

if I had insurance and I told him I did." Thereupon the plaintiff

proved that a juror he withdrew was a material witness. We do not

consider there is any merit to the contention that such witness was

prejudicial to the plaintiff.

During the closing argument of the attorney for the plaintiff

a spectator in the court room said a loud remark as to some figures,

the effect of

either "\$8,000 or \$18,000." Complaint is made that "this statement"

was so directed the attention of the jury from the evidence and



argument at hand. We do not consider that such remark was detrimental to the plaintiffs case.

Inasmuch as in our opinion no reversible error has been called to our attention by the brief of appellants, the judgment of the trial court is affirmed.

Affirmed.



to the extent of the same.

1994



Abstract

A

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

February Term, A. D. 1949

General No. 9638

Agenda No. 20

1063

Albert R. Hayes,  
Plaintiff-Appellee,

vs.

Herbert C. Todd,  
Defendant-Appellant.)

Appeal from

Circuit Court of

Morgan County

336 I.A. 602<sup>1</sup>

Wheat, J.

This is an appeal by defendant-appellant, Herbert C. Todd, from a judgment entered upon jury verdict in the sum of \$428.21 in favor of plaintiff-appellee, Albert R. Hayes, in an action for damages to plaintiff's truck.

Plaintiff's tractor truck had been parked at the curbing on the west side of South Main Street in Jacksonville, Illinois, headed in a southerly direction. About 5:30 P.M., on February 7, 1947, the automobile driven by defendant, southerly, on such street, collided with the rear end of plaintiff's truck. It was then snowing and either entirely or almost dark. The parked truck had no lights burning but did have two reflectors on the rear end.

Among other assignments of error is the claim that the giving of plaintiff's instruction 15 constituted error. This instruction states that an ordinance of the City of Jacksonville made it unlawful to drive an automobile in the residential area at a speed greater than 25 miles per hour, and that if defendant was driving at a greater speed such act was negli-



100-10000

REPORT OF THE

COMMISSIONER OF THE

STATE OF NEW YORK

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

ON JANUARY 10, 1900

ALBANY: J.B. LIPPINCOTT & CO., PRINTERS, 1900.  
PUBLISHED BY THE STATE OF NEW YORK, 1900.  
RECEIVED JANUARY 10, 1900.

3871/202

1900.

THIS IS A REPORT OF THE COMMISSIONER OF THE STATE OF NEW YORK

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE ON JANUARY 10, 1900

AS TO THE STATE OF THE STATE OF NEW YORK

IN THE YEAR 1900

IN THE YEAR 1900

ON THE PART OF THE STATE OF NEW YORK

IN THE YEAR 1900

IN THE YEAR 1900

IN THE YEAR 1900

IN THE YEAR 1900

ON THE PART OF

THE STATE OF NEW YORK

IN THE YEAR 1900

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gence on his part. The giving of an instruction, in this form, has many times been held reversible error. A violation of an ordinance is only prima facie evidence of negligence and it must be left to the jury to determine whether or not the running at a speed in excess of the legal limit was greater than is reasonable and proper, having regard to the traffic and the use of the way. (Wallace v. Yellow Cab Co., 238 Ill. App. 283) The ordinance of the City of Jacksonville, by its very terms, makes driving at a prohibited speed only prima facie evidence of violation, in the following language: "No person shall drive \* \* \* at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed \* \* \* exceeds twenty-five miles an hour \* \* \* such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper \* \* \*".

Plaintiff seeks to justify the instruction by citing the case of Hawn v. Brooks, 331 Ill. App. 535. In that case the court said: "It is contended that peremptory instructions Nos. 9, 10, and 13 given on behalf of plaintiff, charged the jury that a violation of a statute was negligence per se. We are not of that opinion. These instructions charged the jury that if the defendants committed certain acts and 'that in so doing they were guilty of negligence' their verdict should be for the plaintiff. An instruction similar to plaintiff's instructions 9, 10, and 13 was approved in Kuzminski v. Waser, 314 Ill. App. 438. In the cases of Burke v. Zwick, 299 Ill. App. 558, and Rasmussen v. Wiley, 312 Ill. App. 404, chiefly







relied on by defendants in support of their contention, the instructions are not set out in the opinion, but from what is said in these opinions it is clear that the instructions summarily charged the jury that a violation of a statute was negligence." It is obvious that this case emphasizes the objectionable elements contained in Instruction 15 in this case. The giving of this instruction was reversible error.

Complaint, with some merit, is made of other instructions, but as a new trial is necessary, these objections will no doubt be obviated at such time.

The cause is reversed and remanded for a new trial.

Reversed and remanded.



...of by defendant in view of their condition, the  
instructions are not out of the question, and it is not  
to be said in these circumstances it is clear that the defendant  
... charged that fact that a violation of a statute was  
negligence. It is provided that this case requires the  
defendant's witness to be shown in the evidence it is said  
case. The giving of this instruction was reversible error.  
Consequently, with some error, it was of other instructions,  
but as a new trial is necessary, those objections will be  
... be granted at that time.  
The case is reversed and remanded for a new trial.

Reversed and remanded.



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77-01-1  
336-2-113  
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**Abstract**

Gen. No. 10301

Agenda No. 29

IN THE  
APPELLATE COURT OF ILLINOIS

-----  
SECOND DISTRICT 336 I.A. 602<sup>2</sup>  
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OCTOBER TERM, A. D. 1948

WILLIAM E. DAVEY,  
Plaintiff-Appellant

vs

FRED HEIM,  
Defendant-Appellee

APPEAL FROM THE  
CIRCUIT COURT OF  
DUPAGE COUNTY

Dove, J.

Between six-thirty and seven o'clock on the morning of May 5, 1944 the Ford automobile which plaintiff below, appellant here, William E. Davey, was driving, collided with the automobile driven by the defendant below, appellee here, Fred Heim, in the intersection of Illinois Route No. 59 and Butterfield Road in DuPage County. On May 3, 1946 William E. Davey brought this suit to recover the damages he sustained.

The complaint alleged that upon the occasion in question and at all times prior thereto plaintiff was in the exercise of due care for his own safety and charged that the defendant negligently and carelessly operated his automobile in a northerly direction along Illinois Route 59 and into



Abstract

1934, May 10, 1934

IN THE

APPELLATE COURT OF ILLINOIS

8361A-602

RECEIVED MAY 10, 1934

APPELLATE COURT OF ILLINOIS  
CHIEF JUSTICE  
JULIUS ROSENTHAL

WILLIAM E. DAVEY,  
Appellant

vs

FRANK KELLY,  
Respondent

Page 1.

Between six-thirty and seven o'clock on the morning of May 5, 1934 the two automobiles which plaintiff below, appellant here, William E. Davey, was driving, collided with the automobile driven by the defendant below, appellee here, Frank Kelly, in the intersection of Illinois Route No. 59 and Westchester Road in DuPage County. On May 3, 1934 William E. Davey brought this suit to recover the damages he sustained.

The complaint alleges that when the collision in question and at all times prior thereto plaintiff was in the exercise of due care for his own safety and sought and obtained reasonably and lawfully operated his automobile in a northerly direction on Illinois Route 59 and that



its intersection with Butterfield Road which was an east and west highway at a greater rate of speed than was reasonable and proper and without keeping his car under control and without keeping any lookout so as to have discovered plaintiff's automobile which was approaching from the right and without giving plaintiff any warning of the approach of defendant's automobile.

~~which was approaching from the right and without giving plaintiff~~

ziff. The defendant answered denying the allegations of due care and all charges of negligence and alleged that Illinois Route 59 was a preferential highway and alleged the duty of the plaintiff to bring his car to a stop as he proceeded westerly on Butterfield Road before entering upon or crossing Route 59 and averred a breach of that duty. The reply of the plaintiff denied that he failed to bring his car to a full stop as near the right of way line of Route 59 as possible and denied that he was guilty of any carelessness or negligence which proximately contributed to his injuries.

The issues thus made were submitted to a jury resulting in a verdict in favor of the defendant upon which judgment was rendered and the plaintiff appeals.

The evidence discloses that Route 59 is a preferential highway running north and south where it intersects Butterfield Road which runs in an easterly and westerly direction. Both highways were straight and level. The day was clear and fair and the pavements dry. Both parties were familiar with both highways, had frequently traveled them for many years and were familiar with the intersection. There was a regulation stop sign and also two regulation warning signs on the north side







of Butterfield Road and east of the intersection of that road and Route 59. One warning sign was 797 feet east of the easterly edge of the concrete pavement of Route 59 and the other 380 feet east of the easterly edge of said pavement. The stop sign was 35 feet east of the easterly edge of said pavement. The plaintiff testified that he stopped his car with the front end of his car even with the stop sign, that he looked to the right and to the left, that there were no trees or obstructions to his view and that he could see seven or eight hundred feet and that nothing was coming from the north, that he saw the defendant's car about 250 feet south of the intersection proceeding north at thirty to thirty-five miles per hour, that he, the plaintiff, then started his car in low speed and started west across the intersection at the rate of two or three miles per hour, that when the front wheels of his car were approaching or straddling the center line of Route 59 he again looked to the south and he estimated that the defendant's car was then about fifty-feet south of his car and traveling at the rate of fifty-five or sixty miles per hour. The next time plaintiff looked was immediately before the collision and at that time the front wheels of his car were over the center line of the pavement on Route 59.

According to the testimony of the defendant he first observed the car of the plaintiff when he, the defendant, was proceeding north on Route 59 in the east lane and when his car was about 250 feet from the Butterfield Road intersection. At that time he, the defendant, was driving 30 or 35 miles per hour and the plaintiff's car was proceeding at about the same rate of speed. After he, the defendant, had travelled about







150 feet more and was within about 100 feet of the intersection he slackened his speed to about 30 miles per hour and as he entered the intersection his speed was about 28 miles per hour. He observed that the plaintiff as he proceeded west along Butterfield Road did not reduce the speed of his car but continued into the intersection without stopping and was travelling at between 30 and 35 miles per hour at the time of the collision which occurred in the east lane of Route 59. The plaintiff and defendant were the only occurrence witnesses. There was other testimony as to the condition and position of the cars after the collision and several pictures of the highway and cars ~~xx~~<sup>are</sup> found in the record which we have examined. There is no complaint made of the rulings of the trial court upon the admission of evidence but it is earnestly insisted by counsel for appellant that the trial court erred in giving to the jury and in refusing to give to the jury several instructions.

At the request of the defendant the court gave this instruction:

The Court instructs the jury that at the time of the occurrence in question there was in full force and effect, and binding upon all of the parties in this cause, a certain statute of this state, which is as follows: 'The Department (meaning the Department of Public Works and Buildings of the State of Illinois, acting directly or through its duly authorized officers and agents) may in its discretion, and when traffic conditions warrant such action, give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road over traffic crossing or entering such highway by erecting appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway shall come to a full stop as near the right of way line of such highway as possible and regardless of direction, shall give the right of way to vehicles upon such highway.' You are further instructed that if you find from the evidence that the plaintiff, William E. Davey, was then and there driving his automobile upon and along Butterfield Road in a westerly direction towards its intersection with







State Highway #59, and that the Department of Public Works and Buildings of the State of Illinois had, prior to the occurrence in question, in its discretion given preference to traffic upon said highway known as State Highway #59, and had, before the occurrence in question, erected an appropriate stop sign immediately East of State Highway #59 and immediately North of the highway known as Butterfield Road, and if you further find from the evidence that the said plaintiff William T. Davey did not bring his automobile to a complete stop as near the right of way line of State Highway #59 as possible, and regardless of direction, give the right of way to vehicles upon such highway known as State Highway #59, when so to do was necessary to avoid colliding with the automobile driven by the defendant in a northerly direction along State Highway #59 there, and that such failure of the said plaintiff to stop and yield said right of way was negligence on his part which proximately contributed to cause the accident and the injuries complained of by the plaintiff, then you should find the defendant not guilty.

It is insisted that this instruction completely ignores the relative speeds and distances of the respective automobiles from the intersection, assumes that defendant had the right of way and tells the jury that if a complete stop was not made by the plaintiff the defendant should be found not guilty. The instruction correctly quotes the applicable statute and after so stating told the jury that if they find from the evidence that the plaintiff violated that statute by not bringing his car to a complete stop and failed to yield the right of way when so to do was necessary in order to avoid a collision with appellant's car and that such failure to stop and so yield the right of way was negligence and that such negligence proximately contributed to cause the injuries complained of by the plaintiff, then the jury should find the defendant not guilty. There was evidence upon which this instruction was based and the instruction was in accordance with the theory of the defendant's defense. Under the evidence in this record, we do not think the giving of this instruction was error.



[illegible][illegible]



It is next insisted that the court erred in giving the jury this instruction:

"The court instructs the jury, that if you believe from the evidence that the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger would have avoided the injury on the occasion in question and that he negligently failed to do so, and thereby contributed to his injury, if you believe the plaintiff was injured and his automobile damaged, then the plaintiff cannot recover."

In *Flynn v. Chicago City Ry. Co.*, 250 Ill. 460 at page 480 the court held that this instruction states a correct proposition of law and that its refusal constituted reversible error.

The other given instruction complained of told the jury that the plaintiff was required to prove his case by a preponderance of the evidence before he could recover and continued:

"If the plaintiff has not so proven his case, or if the evidence is evenly balanced so that the jury are unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then in either of these cases, the verdict should be not guilty."

This instruction stated correct propositions of law and in view of all the given instructions cannot be said to have mislead or confused the jury. Substantially the same instruction was approved in *Koshinski v. Illinois Steel Co.*, 231 Ill. 198, 203; *Chicago Union Traction Co., v. Kee*, 213 Ill. 9, 14; *Stollery v. Sprague*, 301 Ill. App. 209, 215 and *Stivers v. Black and Co.*, 315 Ill. App. 33, 45-46.

It is also insisted that the trial court erred in refusing to give to the jury two instructions tendered by the plaintiff. One of these instructions is as follows:

"The Court instructs the jury that the phrase 'Material point' means in this case any point



It is well known that the Court has not been able to

1897-1898

The first of these is the fact that the  
 Government has been unable to secure  
 the necessary funds to carry out its  
 policy of non-interference in the  
 internal affairs of the Republic.  
 The second is the fact that the  
 Government has been unable to secure  
 the necessary funds to carry out its  
 policy of non-interference in the  
 internal affairs of the Republic.

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54 EAST LAKE STREET, CHICAGO, ILL. 60601  
U.S.A. AND CANADA  
OTHER COUNTRIES: 001 773 847 7000

The above given instructions were followed at all times and that the difficulty was removed to leave the case as a representative of the evidence before the court.

[illegible]

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It is also suggested that the trial court would be in  
retaining to give to the jury two instructions suggested by the  
plaintiff. One of these instructions is as follows:

"The Court instructs the jury that the phrase  
'material point' means in this case any point



upon which the existence or non-existence of the claimed liability, or the claimed damages may depend. You are further instructed that where two witnesses testify directly opposite to each other, you are not bound to consider the evidence evenly balanced or the point not proved so far as those two witnesses are concerned, but you may regard all the surrounding facts and circumstances and other evidence, if any, and give credence to one witness over the other, if you think such facts, circumstances and evidence warrants it.

The first part of this instruction bears no connection with the concluding portion. All that was proper in this instruction was covered by the sixth given instruction. There was no error in refusing this instruction as tendered. By the other refused instruction the jury were advised that "One of the issues in this case is whether or not the defendant was guilty of negligence at the time and place in question and that this issue involves your consideration of the following questions:

- (1) Did the defendant carelessly and improperly run, operate and manage his automobile?
- (2) Did he carelessly fail to keep the same under proper and sufficient control?
- (3) Did he negligently fail to keep any lookout, or any proper and sufficient lookout to discover plaintiff's automobile as it was approaching from the right and was crossing the intersection, if you find that plaintiff's automobile was so approaching and crossing?
- (4) Did the defendant negligently run his automobile at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the way, or so as to endanger plaintiff's life or limb?

You are further instructed that if you find from a preponderance of the evidence under the instructions of this court in this case, that any one or more of the foregoing questions requires an affirmative answer and that defendant was guilty of negligence directly and proximately causing injury to the plaintiff, as charged by the plaintiff and open to your consideration under this instruction, then the plaintiff has made out his charge of negligence on the part of the defendant."

~~In view of the fact that the defendant's given instructions the court may have given the instruction in view of the fact that~~



1. The following information was received from the Bureau of the Census, Washington, D. C., on July 1, 1964:

on the part of the defendant.

— 5 —



The eighth instruction given on behalf of the plaintiff told the jury that if they found from a preponderance of the evidence that the plaintiff stopped his automobile in obedience to the stop sign facing him as he approached Route 59 and as near as possible to the right of way line of said Route 59, and in the exercise of due care and caution for his own safety proceeded to start across the intersection when the defendant's automobile was such a distance from the intersection that, if it was being operated at a rate of speed that was reasonable and proper having regard to the traffic and use of the way, the plaintiff would or could have passed over and across the intersection and cleared the same before the defendant's automobile arrived at the intersection, then it was the duty of the defendant to so operate and control his automobile as to permit the plaintiff to make and complete the crossing in safety. Other given instructions defined negligence, contributory negligence and due care and quoted the applicable statutory provisions with reference to the rate of speed of automobiles travelling upon the highways of this state. Altogether twenty-four instructions were given to the jury and the refusal of this instruction should not work a reversal of this judgment.

What this court said in *Ritter v. Niemen*, 329 Ill. App. 163 at page 171 may well be repeated here: "What is the purpose of a stop sign? Certainly it does not signify that a motorist should stop and then blindly proceed through a protected intersection without determining he can do so with reasonable safety. The operator of a motor vehicle, when he stops at a preferred







highway should ascertain if he can proceed safely across such highway. If he can not, he should not enter it. Merely stopping some place near a stop sign does not necessarily discharge one's duty. \*\*\*\*\* A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare."

The judgment of the circuit court of DuPage County is sustained by the evidence and the record is free of reversible error. The judgment will therefore be affirmed.

Judgment affirmed.







O.K.  
Hunt

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Abstract

Gen. No. 10310

Agenda No. 14

IN THE  
APPELLATE COURT OF ILLINOIS

-----  
SECOND DISTRICT  
-----

336 I.A. 603

OCTOBER TERM A. D. 1948.

E. T. O'NEILL and  
CHARLES J. O'NEILL,  
d/b/a O'NEILL BROTHERS  
Plaintiffs-Appellees

vs

W. A REAMAN and  
EDITH REAMAN,  
Defendants-Appellants

APPEAL FROM THE  
COUNTY COURT OF  
KANKAKEE COUNTY

Dove, J.

On November 10, 1942 a judgment by confession was entered in the County Court of Kankakee County in favor of appellees and against appellants for \$488.41 upon a note executed by appellants for \$250.00, dated November 16, 1931 due six months after date and bearing 7% interest from date. On the back of the note appears a \$17.50 credit of interest dated December 1, 1932. Upon motion of the defendants this judgment was opened up and it was ordered that the affidavit filed by defendants in support of their motion should stand as their plea. This affidavit executed by both defendants, alleges that they have a defense to a



Case No. 10710

Filed Nov. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

COLEMAN TRUST CO. vs. JAMES

W. T. O'NEILL and  
CHARLES J. O'NEILL  
vs. O'NEILL BROTHERS  
Plaintiffs-Appellees

vs

W. A. KANAK and  
EDITH KANAK  
Defendants-Appellants

APPEAL FROM THE  
COUNTY COURT OF  
HARRIS COUNTY

Dove, J.

On November 10, 1931 a judgment by confession was entered in the County Court of Harrison County in favor of appellees and against appellants for \$482.41 upon a note executed by appellees for \$500.00, dated November 10, 1931 due six months after date and bearing 7% interest from date. On the face of the note appeared a \$17.50 credit of interest dated December 1, 1931. Upon motion of the defendants this judgment was set aside and it was ordered that the affidavit filed by defendants in support of their motion should stand as their plea. This affidavit executed by both defendants, alleges that they have a defense to a



part of plaintiff's demand and avers that on October 5, 1933 they paid the plaintiffs \$236.44 on the note but that plaintiffs failed to give them credit therefor. Upon a hearing before the court on November 17, 1947 an order was entered finding the issues for the plaintiffs and affirming the judgment originally rendered on November 10, 1942. To reverse this order and judgment defendants appeal.

Upon the hearing it appeared that the money evidenced by the note sued on was borrowed by Wm. A. Reaman, and his wife, Edith Reaman, executed the note with him. They were farmers and Mrs. Reaman testified that at the time Mr. Reaman paid the interest amounting to \$17.50 in December 1932 her husband told the plaintiffs that he would finish paying the note when he threshed the following year. When the grain was harvested in 1933, it was hauled to the elevator at Grant Park, operated by Mr. and Mrs. George Laufer. Defendants were indebted to plaintiffs upon an open account (O'Neill v. Reaman, 335 Ill. App. 327) and also indebted to George Laufer. From the sale of the grain in the fall of 1933, Mr. Laufer retained \$203.00 to liquidate the indebtedness of appellants to him and paid the balance amounting to \$236.44 to E. T. O'Neill on October 21, 1933. The payment of this amount was evidenced by two checks, one for \$77.41 and the other for \$159.03, aggregating said sum of \$236.44 and these are the items shown credited on the Reaman account under the date of October 21, 1933 and appearing in the report of the case of O'Neill v. Reaman, 335 Ill. App. 327 at page 331. The three preceeding items of the account would indicate that the threshing amounted to \$74.41.



part of plaintiff's demand and avers that on October 6, 1933 they paid the plaintiff \$236.44 on the note but that plaintiff failed to give them credit therefor. Upon a hearing before the court on November 17, 1947 an order was entered finding the issues for the plaintiff and affirming the judgment originally rendered on November 10, 1943. To reverse this order and judgment defendant appeals.

Upon the hearing it appeared that the money evidenced by the note used on was borrowed by W. A. Reaman, and his wife, Edith Reaman, executed the note with him. They were farmers and Mrs. Reaman testified that at the time Mr. Reaman paid the interest amounting to \$7.50 in December 1933 her husband told the plaintiff that he would finish paying the note when he threshed the following year. When the grain was harvested in 1933, it was hauled to the elevator at Grant Park, operated by Mr. and Mrs. George Lanter. Defendants were indebted to plaintiff upon an open account (O'Neill v. Reaman, 335 Ill. App. 327) and also indebted to George Lanter. From the sale of the grain in the fall of 1933, Mr. Lanter retained \$205.00 to liquidate the indebtedness of appellants to him and paid the balance amounting to \$236.44 to E. T. O'Neill on October 31, 1933. The payment of this amount was evidenced by two checks, one for \$7.41 and the other for \$228.03, aggregating said sum of \$236.44 and these are the items shown credited on the Reaman account under the date of October 31, 1933 and appearing in the report of the case of O'Neill v. Reaman, 335 Ill. App. 327 at page 331. The three preceding items of the account would indicate that the threshing amounted to \$74.41.



The account, however, was credited with the full amount of both of the checks which appellees received from the elevator.

Counsel for the respective parties agree that the sole question involved in this appeal is whether appellees had a right to credit the \$236.44 which they received from the elevator operated by Mr. and Mrs. Laufer on the open account of the defendants instead of upon the note upon which this suit is brought. Counsel also agree that debtors who are indebted to another upon an open account and upon a note have an absolute right to direct how a payment made by them shall be applied. (Jackson v. Bailey, 12 Ill. 159, 161.)

The only competent evidence in this record which tends to prove that appellants directed that the payment of \$236.44 be applied upon the note is that of Mrs. Reaman to the effect that she heard her husband tell appellees at the time the interest payment was made in December, 1932 that he would finish paying the note when he threshed the following year. This was a statement of what his future intentions were. There is evidence to the effect that appellants told appellees they would leave the money at the elevator in payment of the 1933 threshing and that the remainder was to be applied upon the open account and not upon the note and at the time E. T. O'Neill received the two checks from Mr. Laufer, he, O'Neill, gave Laufer two receipts, one for \$77.41 specifying it was "for year 1933 threshing of wheat, oats and barley" and the other for \$159.03 which specified it was for labor and back threshing. Mr. Laufer died prior to the trial of this case.

There is no necessity of setting the evidence out



The account, however, was credited with the full amount of both  
 of the checks which appellants received from the elevator.  
 Counsel for the respective parties agree that the  
 sole question involved in this appeal is whether appellants had  
 a right to credit the \$238.44 which they received from the  
 elevator operating by Mr. and Mrs. Lanter on the open account  
 of the defendant instead of upon the note upon which this suit  
 is brought. Counsel also agree that debtors who are indebted to  
 another upon an open account and upon a note have an absolute  
 right to direct how a payment made by them shall be applied.  
 (Jackson v. Bailey, 12 Ill. 132, 131.)  
 The only competent evidence in this regard which tends  
 to prove that appellants directed that the payment of \$238.44  
 be applied upon the note is that of Mrs. Lanter to the effect  
 that she heard her husband tell appellants at the time the  
 interest payment was made in December, 1932 that he would finish  
 paying the note when he finished the following year. This was  
 a statement of what his future intentions were. There is  
 evidence to the effect that appellants told appellants they would  
 leave the money at the elevator in payment of the 1933 threatening  
 and that the remainder was to be applied upon the open account  
 and not upon the note and at the time W. T. O'Neill received  
 the two checks from Mr. Lanter, he, O'Neill, gave Lanter two  
 receipts, one for \$238.44 specifying it was "for year 1932"  
 threatening of "cash, oats and barley" and the other for \$188.03  
 which specified it was for labor and back threatening. Mr. Lanter  
 died prior to the trial of this case.  
 There is no necessity of settling the evidence out



more fully in this opinion. Some of the witnesses who testified upon the trial of O'Neill v. Reaman, 335 Ill. App. 327, wherein these appellees were seeking to recover upon this open account as an account stated, testified with similar import upon this trial. We have read all the evidence found in this record. It sustains the findings and judgment of the trial court and the law is well settled that the findings of the trial court upon a record such as this should not be disturbed on appeal unless the findings are against the manifest weight of the evidence. (Winnetka Park District v. Hopkins, 371 Ill. 46; Roberts v. City of Rockford, 296 Ill. App. 469.)

The judgment of the County Court of Kankakee County is affirmed.

Judgment affirmed.



more fully in this opinion. Some of the witnesses who testified upon the trial of O'Neil v. Bremer, 330 Ill. App. 537, wherein these appellants were seeking to recover upon this open account as an account stated, testified with similar import upon this trial. We have read all the evidence found in this record. It sustains the findings and judgment of the trial court and the law is well settled that the findings of the trial court upon a record such as this should not be disturbed on appeal unless the findings are against the manifest weight of the evidence. (Ill. App. 482.) v. Hopkins, 371 Ill. 48; Roberts v. City of Rockford, 288 Ill. App. 482.)

The judgment of the County Court of Kane County is affirmed.

Judgment affirmed.



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by  
mrfc

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Abstract

Gen. No. 10350

Agenda No. 12

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

1173

---  
FEBRUARY TERM, A.D. 1949

--- 336 I.A. 604

DRAINAGE COMMISSIONERS OF  
SUP-DISTRICT NUMBER ONE OF  
DRAINAGE UNION DISTRICT  
NUMBER ONE OF THE TOWN OF  
ELIZA IN MERCER COUNTY AND  
DRURY IN ROCK ISLAND COUNTY,  
ILLINOIS,

Plaintiffs-Appellees

vs

HARMON RUSSELL and  
HERBERT LINDELOM,

Defendants-Appellants

APPEAL FROM THE  
CIRCUIT COURT OF  
MERCER COUNTY

Dove, J.

On November 30, 1948 the verified complaint in this case was filed alleging that the plaintiffs are the duly elected qualified and acting commissioners of a drainage district organized under the provisions of the Farm Drainage Act; that the district includes over 4000 acres of land which drains through a system of ditches and the plaintiffs have been granted a right of way for the maintenance and upkeep of the main ditch; that the plaintiffs have entered into a written contract with Lee Osborn, after publication of notice of letting of bids, and after competitive bidding, in compliance with law to clean out said main ditch; that in







accordance with said contract, Osborn entered into possession of the right of way of said ditch and has completed the cleaning out of the greater portion of said ditch and on November 26, 1948 plaintiffs passed a resolution for the levying of an assessment to raise sufficient funds for the completion of the work on said main ditch.

The complaint then charges that the defendants, without knowledge or permission of the plaintiffs, have entered onto a portion of the plaintiff's right of way of the main ditch and commenced digging therein with a drag line; that plaintiff's served the defendants with a written notice to cease working in said main ditch but that defendants ignored said notice and are still digging therein; that plaintiffs do not know whether the defendants are competent or whether they are or are not financially responsible but that they are obstructing the ditch, interfering with the work which has been and is to be performed by Osborn and have ousted the plaintiffs from their possession and control of the right of way in said ditch; that plaintiffs fear the ditch will be damaged and the drainage of the lands of the district will be interfered with, and plaintiffs subjected to various damage suits by various land owners and also by Osborn unless an injunction issue without notice. The prayer of the complaint was that a temporary injunction issue restraining the defendants from doing any further work in the right of way of the main ditch of sub-district No. One of Drainage Union District No. One, of the Town of Eliza in Mercer County and Drury in Rock Island County, Illinois and that upon a hearing



[illegible]



that said injunction be made permanent.

In accordance with the prayer of the complaint an order was entered requiring plaintiffs to execute a \$1000.00 bond to be approved by the clerk and upon that being done a temporary writ was directed to issue as prayed. The required bond was executed and approved, the writ issued and was duly served on the defendants on December 1, 1948. On December 6, 1948 the defendants appeared and filed their motion to dissolve the temporary injunction and dismiss the suit. Upon a hearing this motion was denied and defendants appeal.

It is contended by counsel for appellants that the allegations of the complaint are insufficient to warrant the issuance of the writ in this case without notice. Counsel insist that the complaint is obscure and indefinite and consists chiefly of conclusions of the pleader and counsel argue that the allegations to the effect that plaintiffs have no knowledge as to what defendants intend to do with the drag line, have no knowledge as to the financial responsibility of defendants and have no knowledge of their competence ~~and~~ ~~that~~ indicate a see nothing, hear nothing, and know nothing course of procedure on the part of the commissioners and that the only conclusion which can be drawn from all the allegations of the complaint is that the acts of the defendants are not such as to cause any damage or injury whatsoever to the drainage system of the district.

The effect of the motion of the defendants to dissolve the preliminary injunction is to admit that the



that said information is being furnished.

In accordance with the order of the Committee

on March 22, 1944, the following information is being furnished:

(1) The fact that the information is being furnished

being made a confidential source of information is being

The following information is being furnished, and it is stated

and was only received on the information on December 1, 1944.

On December 1, 1944, the following information is being

action to eliminate the Communist Party and its

and. When a certain time limit was reached and delivery

is being

It is requested by counsel for appellants that the

allegations in the indictment be investigated to prevent the

information of the fact in this case from being known.

It is requested that the Committee be advised and informed and

also advise of the results of the investigation and counsel

that the information is being furnished and that it is

requested that the Committee be advised of the results of the

investigation and that the Committee be advised of the results

of the investigation and that the Committee be advised of the

results of the investigation and that the Committee be advised

of the results of the investigation and that the Committee be

the only person who has been known to all the appellants

of the Committee is that the fact of the investigation was

that it is being furnished and that the Committee be

advised of the results of the investigation.

The effect of the order of the Committee is

to eliminate the Communist Party and its



plaintiffs are the duly elected, qualified and acting commissioners of the described farm drainage district and that this district includes over 4000 acres of land which drain through a system of ditches and that plaintiffs are the owners of a right of way and charged with the duties of maintaining and upkeeping this main ditch; that they have entered into a written contract with Lee Osborn to clean out this main ditch; that Osborn has completed the cleaning out of the greater portion thereof and defendants, without any right or permission so to do, have entered into a portion of this main ditch and commenced digging therein with a drag line; that prior to the time the complaint was filed they served defendants with a written notice to cease working in said ditch which notice defendants ignored and without right or authority defendants continued to dig in said main ditch with a drag line and were so doing at the time the complaint was filed thereby obstructing the ditch and interfering with the work which Osborn was performing.

The statute (Ill. Rev. St. 1947, chap. 69, Sec. 3) provides that no court shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be effected thereby unless it shall appear from the complaint that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately without notice. In the instant case the defendants were trespassers, they were upon premises with a drag line, they had been given written notice to quit working in said main ditch, they paid no attention to said notice but continued to trespass upon plaintiffs' property.







This drainage district was organized to drain farm lands. The plaintiffs exercised exclusive jurisdiction over the ditches comprising this system. They represented all the land owners of this district. The defendants, without permission or consent and against the expressed written order of the commissioners had entered the main ditch with a drag line and had commenced digging therein. Under oath the commissioners state that if the preliminary writ is not issued without notice, the ditch will be damaged and the drainage of the lands of the district interfered with; that they, the commissioners, will be subjected to damage suits by various land owners and by Osborn and that the injury to the ditch and the drainage system of the district is or may be irreparable and that the acts of the defendants constitute repeated trespasses. The chancellor required a substantial bond of the plaintiffs before the writ issued and if, upon a full hearing, it appears that the temporary writ was improvidently granted, defendants are amply protected.

An interlocutory injunction is merely provisional in its nature and does not conclude a right. Its object is to preserve the subject in controversy but it is not decisive of the cause upon the merits. The court merely recognizes the fact that, without expressing a final opinion, a sufficient showing has been made to warrant the preservation of the property or the rights in issue in status quo until a hearing may be had upon the merits of the cause. The granting of an interlocutory injunction necessarily rests largely in judicial discretion, to be exercised in view of the facts



This doctrine is not to be applied in this form  
alone. The principle involved is not jurisdiction over  
the person of the defendant but over the property.  
The defendant, the defendant, the defendant, the  
defendant on account of the defendant's right of  
of the defendant's had entered the land with a dog  
line and had commenced clearing the land. Under the  
doctrine it is the defendant's right to the land  
without notice, the right will be denied and the  
the land of the defendant is not to be taken, the  
defendant, will be entitled to the land by virtue  
land owner and by virtue of the right to the land  
and the doctrine of the defendant is to be applied  
and that the right of the defendant is to be applied  
The defendant is entitled to the land by virtue of  
before the right to the land and the right to the  
that the defendant is not to be applied, the  
are not to be applied.

As the defendant is not to be applied, the  
in its nature and does not constitute a right. The right is to  
preserve the right in the defendant and is not to be applied  
of the case over the right. The court is not to be applied  
the fact that, without exception, a right to the land is well-  
known and has been used to maintain the right of the  
the right of the right to the land in the defendant and the  
hearing may be held upon the right of the defendant. The  
of an interdictory injunction is not to be applied in  
judicial discretion, to be exercised in view of the facts.



of the of the particular case. People v. Standidge, 333 Ill. 361, 365.

"If a defendant manifests a purpose to persist in perpetrating his unlawful acts, the vexation, expense and trouble of prosecuting the actions at law make the legal remedy inadequate and justify a plaintiff in coming into equity for an injunction." Pomeroy Equitable Remedies Sec. 496 quoted with approval in Cragg v. Levinson, 233 Ill. 69 at page 86, where it was held that a court of equity may interfere by injunction where a defendant without any right or claim of right commits repeated trespasses and where it appears he intends to continue to do so. The allegations of the instant complaint were sufficient, in our opinion, to authorize the issuance of a temporary ex writ without notice and are sufficient to require the defendants to answer the charges therein contained.

The chancellor did not err in granting the preliminary injunction without notice nor did he err in refusing upon motion, to dissolve the temporary injunction. The order appealed from will, therefore, be affirmed.

Order affirmed.



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1883, 1884.

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